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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 18

NORFOLK & WESTERN RAILWAY COMPANY,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF VIRGINIA

FILED MARCH 16, 1932

(36,610)

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[fol. 5]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

NORFOLK & WESTERN RAILWAY COMPANY, Petitioner,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

PETITION—Filed June 5, 1931

To the Honorable the District Court of the United States for the Western District of Virginia:

Your petitioner, Norfolk and Western Railway Company, hereinafter called the "Railway Company", brings this action against the United States of America and the Interstate Commerce Commission, hereinafter called the "Commission", for the purpose of enjoining, setting aside, annulling and suspending a certain order of the Commission, not relating to transportation, made and entered on the 5th day of January, 1931, in a proceeding begun by the Commission not upon the petition of the carrier but on its own motion.

For its cause of action petitioner states:

(1) The Norfolk and Western Railway Company is, and at all times hereinafter mentioned was, a railroad corporation duly organized and existing under the laws of the State [fol. 6] of Virginia, owning, maintaining and operating a line of railroad situated in the States of Virginia, West Virginia, Ohio and other States, and engaged in the transportation of railroad freight, for hire, in interstate and foreign commerce, and is a common carrier by railroad, subject to the Interstate Commerce Act. The principal operating office of the Railway Company is now, and was at all such times, situated in the City of Roanoke, in the said Western District of Virginia.

(2) The United States of America is made defendant in this suit pursuant to the Commerce Court Act (36 Stat. at L. 539), approved June 18, 1910, and the District Court Jurisdiction Act, being part of the Urgent Deficiencies Act (38 Stat. at L. 219) approved October 22, 1913.

(3) The Commission is an administrative tribunal created by the Act to Regulate Commerce (24 Stat. at L. 379), approved February 4, 1887, as amended (the Interstate Commerce Act), and is specifically charged with the administration and enforcement of said act, including Sections 10, 15a, 19a and 20 thereof.

(4) Said Section 19a of the Interstate Commerce Act makes it the duty of the Commission, among other things, to inventory the property of carriers, subject to the provisions of the act; to report certain costs and values with respect to property owned or used for purposes of a common carrier; and to show separately the property held for purposes other than those of a common carrier.

[fol. 7] (5) Said Section 15a of the Act makes it the duty of the Commission so to adjust the rates to be charged by common carriers, subject to the Interstate Commerce Act, that such carriers as a whole (or as a whole in such groups as may be established by the Commission thereunder) will earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation; and further declares that any carrier which, under the provisions of said section, shall receive for any year a net railway operating income in excess of six per centum of the value of the railway property held for and used by it in the service of transportation, shall hold one-half of said excess as trustee for and shall pay it to the United States. Said Section further provides that the value finally ascertained pursuant to Section 19a for the railway property of any carrier so held and used shall be deemed the value thereof for the purpose of determining the aggregate value referred to.

(6) Section 20 of the Act authorizes the Commission to prescribe a uniform system of accounts for all common carriers, subject to the provisions of the act, and further to prescribe the manner in which such accounts shall be kept.

(7) Section 20, sub-section 6 thereof, provides, among other things, that in case of failure or refusal on the part of any carrier, receiver, or trustee, to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission that such carrier, receiver, or [fol. 8] trustee shall forfeit to the United States the sum of Five Hundred Dollars ($500.00) for each such offense, and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

(8) Section 10 of said Act provides that any common carrier subject to said act, or any director, officer, agent or other representative or employee thereof, omitting or failing to do any act, matter or thing in said act required, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine not to exceed Five Thousand Dollars ($5000.00).

(9) Under the authority given it by said Section 20 of the Interstate Commerce Act the Commission has prescribed a uniform system of accounts to be kept by steam railroads and in such accounts has classified the investment of such railroads according to whether it is carrier or transportation property, or, on the other hand, noncarrier or nontransportation property. Property used by the carrier in the service of transportation or in connection therewith is known as carrier or transportation property and is classified by the Commission as "Investment in Road and Equipment", and the account is known as balance sheet Account 701. Property entirely distinct from transportation property and not operated in connection with the transportation service is known as noncarrier or nontransportation property and is classified by the Commission as "Miscellaneous [fol. 9] Physical Property" and the account is known as balance sheet Account 705.

(10) (a) On the 14th day of January, 1928, the Commission entered an order in the proceeding known as "Ex Parte No. 100—In the Matter of a Uniform System of Accounts to be kept by Steam Railroads" reading as follows:

"The matter of the classification of investment in collieries and the accounting for the operation thereof by the Norfolk & Western Railway Company being under consideration.

It is ordered, That the carrier's investment in the Howard, Vulcan and Pond Creek Collieries shall be classified as investment in noncarrier property and included in balance sheet account 705, 'Miscellaneous physical property'. That annually there shall be added to the cost of these properties, and included in this account, interest upon the residual investment reckoned at fair interest rates, but not in excess of the rate of 6 per cent. per annum, the amounts thus charged to be concurrently credited to account 515, 'Income from unfunded securities and accounts.'

It is further ordered, That a separate clearing account shall be kept for the operation of each colliery to include the detailed cost of operation and that the monthly charge for depletion shall be upon the basis of such rates per ton, as will as nearly as practical, extinguish the investment in the property (less salvage) during the period in which the coal owned by the carrier is mined.

It is further ordered, That the charges to operating expenses for the coal produced in these collieries which is [fol. 10] used in the carrier operations of the railway shall be upon the basis of the average monthly cost per ton for producing the coal each month."

(b) Thereafter, to-wit: On the 28th day of February, 1928, the Railway Company filed a petition in said proceeding for reconsideration of the matters dealt with in said order, for a hearing and argument as to the propriety of the requirements thereof, and for modification or vacation of said order. The petition alleged that the classification required by said order was incorrect; that the properties involved were owned by the Railway Company and located on its lines of railroad with which they have direct rail or aerial connection; that they were operated by the Railway Company's employees and the coal produced therefrom was used exclusively by the Railway Company in its common carrier operations; and that said properties were carrier properties and should be so classified.

(c) On the 24th day of July, 1928, the Commission entered a supplemental order postponing the effective date of its previous order and assigned the matters dealt with therein for hearing.

(d) Thereafter formal hearings were held in said proceeding at which evidence bearing upon the issues therein

was introduced by both the Railway Company and the Commission. Following the hearings briefs were filed by the Railway Company and the Commission and oral argument was had. Thereafter the Commission by the order here in question purported to determine the classification of the [fol. 11] Railway Company's collieries and the accounting to be observed.

(11) In said proceeding the Commission, to-wit: On the 5th day of January, 1931, made and entered its order of said date (being the order herein complained of) and in said order the Commission referred to and made a part thereof a "report" of the Commission "containing its findings of fact and conclusions thereon", a copy of said report and order marked "Exhibit A" is attached hereto, and is hereby referred to and made a part of this petition with the same effect as if herein set out at length.

(12) In and by said report and order the Commission, among other things, found that:

(a) "the investment of the Norfolk & Western Railway Company in the Howard, Vulcan and Pond Creek Collieries, including commercial stores maintained at these collieries, shall, in accordance with the provisions of the effective accounting classifications, be classified as investment in miscellaneous or nontransportation property, and included in balance sheet account 705, 'Miscellaneous Physical Property'.

(b) "the expense of operating the aforesaid collieries and stores shall be included in Account 534 'Expenses of Miscellaneous Operations', that the taxes thereon shall be included in Account 535, 'Taxes on Miscellaneous Operating Property', and that the revenues derived therefrom shall be included in Account 502, 'Revenues from Miscellaneous Operations', all in accordance with the effective accounting classifications".

(c) "the charges to Account 716, 'Materials and Supplies' for coal produced in these collieries for consumption in the petitioner's transportation operations shall be upon the basis of the average monthly cost per ton for producing said coal".

(13) That said finding in said report and order that the investment of the Railway Company be classified as non-

transportation or noncarrier property and included in balance sheet Account 705 "Miscellaneous Physical Property" is without evidence to support it and contrary to the uncontradicted evidence before the Commission and in violation of Sections 15a and 19a of the Interstate Commerce Act and the law of the land, and constitutes a taking of petitioner's property without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

(14) That the findings contained in said order and report, to-wit:

(b) That "the expense of operating the aforesaid collieries and stores shall be included in Account 534, 'Expenses of Miscellaneous Operation'; that the taxes thereon shall be included in Account 535, 'Taxes on Miscellaneous Operating Property', and that the revenue derived therefrom shall be included in Account 502, 'Revenues from Miscellaneous Operations', all in accordance with the effective accounting classifications",

are based upon an erroneous interpretation of the law as applied to the facts appearing on the face of the report, contrary to the uncontradicted evidence before the Com-[fol. 12] mission and are in excess of the Commission's power under the Statute under which they purport to have been made.

(15) That the finding contained in said order and report, to-wit:

(c) That "the charges to Account 716, 'Material and Supplies', for coal produced in these collieries for consumption in the petitioner's transportation operations shall be based on the average monthly cost per ton for producing said coal,"

is in excess of the power of the Commission under the statute under which it purports to have been made, and is in usurpation of the managerial discretion of petitioner. The Commission has no authority, if the petitioner's collieries are classified as noncarrier or nontransportation property, to determine the cost at which coal is to be charged to the operating expenses of the Railway Company, and for such reason said order is null, void and of no effect.

(16) The following facts appear upon the face of the report of the Commission:

Prior to 1917 the Norfolk & Western Railway Company secured its fuel coal by purchase from commercial mines. With the advent of the World War and increased industrial activity, both normal and as a result of the War, the demand for coal was greatly increased and the purchase price thereof became much higher. Preliminary to arranging for its supply for the contract year of 1917 the Railway Company was confronted with difficulty in securing an adequate supply of fuel. It paid extremely high prices for such coal as it could obtain. After careful consideration the officers and directors of the Railway Company decided, in the interest of economic railway operation, not only to meet the then existing emergency but to insure a permanent source of supply of fuel coal of proper quality at a reasonable cost, to purchase several coal mines at suitable locations from which it could mine on its own behalf a substantial proportion of its fuel requirements.

In reaching this decision the management realized its obligation to insure as far as possible a dependable source of supply of fuel and of keeping to a minimum that part of the operating expense resulting from the purchase of fuel.

In the first part of 1917, two mining properties were purchased, the first property purchased as of April 19th, 1917, embraces what is known as Howard Collieries, and is made up of leasehold rights on approximately 2,875 acres of coal land, together with three coal tipples, loading plants and necessary mining equipment and tenant houses. The fee title of the coal land, subject to the leases of the Railway Company, is vested in the Pocahontas Coal & Coke Company, a subsidiary of the Railway Company. All royalties or payments for the use of the mining rights, as well as the cost of all physical assets, were paid for at the time of purchase by the Railway Company. Subsequent to such purchase additional coal rights were secured on a small acreage of adjoining property; still subsequently an additional lease on approximately 2,400 acres of adjacent land was acquired. [fol. 13] These two subsequent leases provide for a royalty payment as the coal is extracted.

On June 1, 1917, the property known as the Vulcan Colliery was purchased. This property consists of leasehold rights subject to royalty payments as the coal is extracted

on approximately 900 acres, together with mining equipment and tenant houses. Leases on comparatively small acreages of adjacent land were subsequently acquired.

As of December 31st, 1920, the carrier acquired its third coal property, the Pond Creek Colliery. The original purchase involved the acquisition of mining rights on approximately 1000 acres of land, with royalties payable as the coal is mined, together with equipment and tenant houses. An additional lease of approximately 1900 acres adjacent to this colliery has since been acquired.

The total estimated tonnage in all properties at the time of purchase, including subsequent leases, was 53,103,000 tons of coal. Of this amount 8,476,058 tons were mined by the Railway Company to September 30th, 1928. The investment of the carrier in its coal properties, including the purchase cost, the cost of subsequent leaseholds, and the cost of additions and betterments was as of September 30th, 1928—$3,661,036.63. The credits to plant account for depreciation and depletion charges as of the same date were $1,010,569.35, leaving a net capital investment as of that date of $2,650,467.28.

The collieries at the time of acquisition were producing a substantial tonnage, thus serving the useful purpose for which acquired. Since that time the output of the mines has been increasing, and the owned collieries produced [fol. 14] 1,062,705 tons of coal in the first nine months of 1928, which was 48% of the carrier's total fuel requirements.

Many advantages have accrued to the Railway Company from the ownership and operation of said collieries. At two of the collieries, Vulcan and Pond Creek, a substantial part of the output is delivered direct to large coaling stations, from which delivery is made to engine tenders, thus eliminating the use of railroad cars and the transportation and switching expense necessary if commercial coal were purchased for these stations. Concentration of supply and ability to prepare coal to best meet its uses are other important advantages. The saving measured by the difference between the cost of mining and the average price of all purchased fuel has been from time of acquisition of the mines to the end of September, 1928, as shown by the record, $2,631,445.65. The average saving has been 31.05

cents per ton of fuel production. The total savings, as thus measured and without regard for other economical results, was as of September, 1928, only $20,000.00 less than the net capital investment in the mining properties as of that date.

(17) The uncontradicted evidence in the proceeding before the Commission is that the entire output of the mines, except for negligible amounts of coal furnished to mining employees, is consumed in carrier operations; that limitations in the parent or key leases of the Railway Company prohibit commercial exploitation of the mines and no coal is sold commercially; that all of petitioner's coal properties are in actual use, under active development, and have been [fol. 15] since acquisition; that none of them are held as a reserve beyond the normal economic life of property considered as in actual operation or under actual development; that it would not have paid the Railway Company to have purchased at each colliery a fraction of the coal lands that it purchased and then develop them; that the carrier would not have been justified in purchasing the equipment, or in spending the money used in the development of the acreage had the acreage been substantially less at each colliery; that the carrier in purchasing the properties purchased wisely and economically; that the public patrons of the carrier in the past have and at the present are receiving substantial benefits from the ownership and operation of the mines by the carrier.

(18) The only witnesses presented by the Bureau of Accounts of the Interstate Commerce Commission were an accountant and a statistician. They testified to no facts and only expressed opinions on accounting convenience, classifications, and suitability. The accounting witness testified (page 298 of the record) that the mining of coal is a distinct industry, not transportation service; that to include the fuel collieries in the carrier's investment in Road and Equipment Account would destroy comparisons through those accounts between roads owning coal mines and other roads; and that uniformity for comparative purposes was one of the principal objects of the accounting section of the Interstate Commerce Act, Section 20. Again, this witness testified (page 417 of the record) that the test of use is

one of the tests of classification but "the prime test of all [fol. 16] is" the effect in the accounts for comparative purposes and uniformity and that this "is the real test."

(19) Petitioner is advised and now avers and charges that it is entitled under the law to have included in the accounts and inventory of its carrier property all physical property owned and used by said common carrier for its purposes as a common carrier, and that the test determinative of whether its property is carrier or transportation or noncarrier or nontransportation is the use to which such property is put; that the uncontradicted evidence in this proceeding before the Commission shows that the carrier's three collieries are in actual use in the service of transportation, under active development and have been since acquisition. Petitioner is advised and, therefore, avers that under the law and the evidence in this case the Commission should have classified its three collieries as carrier property; that although the evidence is uncontradicted that its collieries are in use in the service of transportation the Commission has allowed questions of economic policy and accounting convenience to determine the issue and has classified its collieries as noncarrier property.

(20) Petitioner is advised and therefore avers that it is the duty and custom of the Commission to list together or inventory the items of its property known as carrier or transportation property and that under the law the petitioner is entitled to receive a fair return upon the value of such property for rate making purposes and six per centum of its value as earnings prior to recapture (under Section [fol. 17] 15a of the Interstate Commerce Act); that by excluding its collieries from the inventory of its carrier property petitioner has been, and will continue to be, deprived of such basis of fair return and such earnings in contravention of the Interstate Commerce Act and in violation of the law of the land and the Fifth Amendment to the Constitution of the United States, and for such reason said order is null, void and of no effect.

(21) Petitioner is advised and therefore avers that under the law its management has the right to determine the manner of acquiring its necessary fuel supply and when in the

exercise of its discretion and judgment it purchases collieries, the entire output of which is used in transportation service, the Commission is without power to classify such collieries as nontransportation property under the guise of power to prescribe forms for accounting, and for such reason the order of the Commission is null, void and of no effect.

(22) Petitioner avers that there is now pending before the Interstate Commerce Commission a proceeding entitled "Finance Docket No. 3865 Excess Income of the Norfolk & Western Railway Company", wherein under Section 15a of the Interstate Commerce Act the Commission has ordered the Petitioner to pay to the Commission alleged excess earnings for the years 1924, 1925 and 1926, and that the order herein complained of, if carried into effect, will prevent the petitioner from securing a proper and legal return on the value of its collieries in similar proceedings which may be instituted by the Interstate Commerce Commission for re-
[fol. 18] capture for the present year and years to come.

(23) Said order of the Commission and every part thereof is, by reason of the premises, unlawful and void, because:

(a) The same is and was made in violation of said Sections 15a and 19a of the Interstate Commerce Act.

(b) The same is and was made without any warrant or authority of law whatever in support thereof.

(c) The terms of said order wholly exceed the lawful power and authority of the Commission and constitute an attempt to supersede the managerial discretion of the carrier.

(d) The same is and was made upon erroneous principles of law and are contrary to the law of the land.

(e) The Commission has erred in said order and report in applying the law to the facts.

(f) The action of the Commission, evidenced by said order, is arbitrary in that such action is not only not supported by the evidence, but, as above alleged, the Commission's findings are contrary to the undisputed evidence before it.

(g) The enforcement of said order against this petitioner will deprive it of its property without due process of law

and will take its private property for public use without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States.

[fol. 19] (24) Petitioner is advised and therefore avers that unless said order of January 5th, 1931, is complied with by the petitioner within a reasonable time, or unless meantime the petitioner is afforded the protection, by way of a writ of injunction, which a Court of Equity alone is competent to grant, it and its officers and agents will under the terms of the Interstate Commerce Act, and particularly under Sections 10 and 20 of said Act, be subjected to a multiplicity of suits and criminal prosecutions for the recovery and assessment of the fines and penalties in said sections provided.

(25) Your petitioner therefore prays:

(a) That a subpœna or subpœnas in chancery issue out of and under the seal of this Honorable Court, directed to the defendants, as required by law, and that due and proper service of such process and of this petition be forthwith made by filling a copy thereof in the office of the Secretary of the Commission, and another copy in the Department of Justice, as in said District Court Jurisdiction Act provided, and that thereby the defendants and each of them be required, on or before a date to be specified in such subpœna or notice, to appear herein and answer this petition, but not under oath, answer under oath being hereby expressly waived.

(b) That a temporary or interlocutory injunction be entered herein, restraining, enjoining and suspending, until the further order of this Court, the effect and enforcement of said order of the Commission.

[fol. 20] (c) That pending a hearing upon the aforesaid application for a temporary or interlocutory injunction a preliminary restraining order be issued in terms restraining, enjoining and suspending the enforcement of said order of the Commission until said application for a temporary or interlocutory injunction shall have been heard and determined.

(d) That after final hearing this Court adjudge, order and decree that said order of the Commission is and has at all times been beyond the lawful authority of the Commis-

sion, and wholly void, and that said order be perpetually set aside, suspended and annulled, and the enforcement thereof perpetually enjoined.

(e) That your petitioner may have such other and further relief in the premises as to equity and justice may appertain and as may be deemed by this Honorable Court to be adequate and proper under the circumstances.

Norfolk and Western Railway Company, by A. C. Needles, President. Attest: I. W. Booth, Secretary. (Corporate Seal.) S. King Funkhouser, D. Lynch Younger, Theodore W. Reath, Solicitors for Petitioner.

[fol. 21] *Duly sworn to by A. C. Needles. Jurat omitted in printing.*

[fol. 22] EXHIBIT "A" TO PETITION

16433

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 100

In the Matter of a Uniform System of Accounts to be Kept by Steam Railroads

Submitted May 14, 1930. Decided January 5, 1931

Collieries owned and operated by a carrier which consumes the output in its common-carrier operations are not transportation property, and the investment therein shall be included in balance sheet account 705, "Miscellaneous physical property." The accounting for the operation of such collieries, and for the coal produced therein and used in the carrier's operations, should be in accordance with the effective accounting classifications.

S. King Funkhouser, D. Lynch Younger, and Theodore W. Reath for Norfolk & Western Railway Company.

Report of the Commission

Division 4, Commissioners Meyer, Aitchison, Eastman, Lewis, Farrell, and Mahaffie

By DIVISION 4:

The Norfolk & Western Railway Company, herein referred to as the petitioner, filed exceptions to the report

proposed by the examiner, and the case was argued orally. Our conclusions differ somewhat from those recommended by him.

This proceeding has to do with the classification of investment in, and the accounting for the operation of, certain collieries owned and operated by the petitioner.

On January 14, 1928, we entered an order herein as follows:

The matter of the classification of investment in collieries and the accounting for the operation thereof by the Norfolk and Western Railroad Company being under consideration.

It is ordered, That the carrier's investment in the Howard, Vulcan and Pond Creek Collieries shall be classified as investment in noncarrier property and included in balance sheet account 705, "Miscellaneous physical property." That annually there shall be added to the cost of these properties, and included in this account, interest upon the residual investment reckoned at fair interest rates, but not in excess of the rate of 6 per cent per annum, the amounts thus charged to be concurrently credited to account 515, "Income from unfunded securities and accounts."

It is further ordered, That a separate clearing account shall be kept for the operation of each colliery to include the detailed cost of operation and that the monthly charge for depletion shall be upon the basis of such rates per ton, as will as nearly as practical, extinguish the investment in the property (less salvage) during the period in which the coal owned by the carrier is mined.

[fol. 23] It is further ordered, That the charges to operating expenses for the coal produced in these collieries which is used in the carrier operations of the railway shall be upon the basis of the average monthly cost per ton for producing the coal each month.

The petitioner, on February 28, 1928, filed a petition herein for reconsideration of the matters dealt within said order, for a hearing and argument as to the propriety of the requirements thereof and for modification or vacation. The petition alleged that the classification required by said order is incorrect; that the properties involved are owned

by petitioner and located on its lines of railroad with which they have direct rail or aerial connection; that they are operated by petitioner's employees and the coal produced therefrom is used exclusively by petitioner in its common-carrier operations; and that they are carrier property and should be so classified. On July 24, 1928, we entered a supplemental order postponing indefinitely the effective date of the previous order and assigning the matters dealt with therein for hearing. Following the hearing briefs were filed by the petitioner and our Bureau of Accounts and Bureau of Valuation.

In the early part of 1917, when the petitioner was confronted with rising prices for fuel and experiencing difficulty in getting coal deliveries, its president was authorized to negotiate for the purchase of going coal operations for the purpose of producing its fuel requirements. Thereafter, the following properties were acquired.

Howard Collieries

These properties include three contiguous former operations located on a short branch connecting with the main line at Chattaroy, W. Va. By the original purchase, April 19, 1917, mining rights were acquired through prepayment of royalty on the coal underlying 2,875 acres of land in Mingo County, W. Va. The fee title, subject to these rights, was taken by the Pocahontas Coal & Coke Company, a subsidiary holding upwards of 200,000 acres of coal lands. The total consideration applicable to capital items was $1,480,665.31. For accounting purposes the petitioner allocated $900,000 to mining rights, $224,775.15 to mine development, and $355,890.16 to mine plant and equipment. Mine development represents the value of entries and working places which permit of the immediate output of substantial tonnage. This purchase was estimated to cover 18,650,000 tons of recoverable coal of which 8,100,000 tons is in a seam that has not yet been worked. Three seams, the Winifrede, Coalburg, and Freeport, were and are being mined. On January 1, 1924, the Coalburg seam under an adjacent tract of 66 acres was leased; and on May 25, 1925, the petitioner leased the Winifrede, Coalburg, and Free-[fol. 24] port seams under an adjoining 2,412-acre tract. Although the latter was on a royalty basis, $250,000 was

paid for cancellation of an outstanding lease. This amount has been treated as the value of leaseholds, and depletion accrued with respect thereto as in the case of the $900,000 item.

It is estimated by the petitioner's witness that the total tonnage covered by the original purchase and subsequent acquisitions was 30,650,000 tons, of which 4,645,062 tons had been mined as of September 30, 1928, approximately three-fourths thereof having been produced from the original purchase. The entire output enters petitioner's fuel supply through delivery into railroad cars. At the current rate of production the estimated life of the coal deposit is 33 years from 1928. About 600 employees are engaged at these collieries. The plant and equipment items are not susceptible of allocation as between the original purchase and subsequent leaseholds.

Vulcan Colliery

This colliery is located on the main line at Vulcan, W. Va., the acreage involved being situated partly in Mingo County, W. Va., and partly in Pike County, Ky. The petitioner, on June 1, 1917, acquired from the Vulcan Coal Company four leaseholds of coal underlying about 900 acres, together with some small surface leases, improvements, equipment, and supplies. The property includes five coal seams of which four were being mined and the fifth was subsequently opened. The outlay for the property exclusive of supplies was $401,193.12, of which $178,712.48 was allocated to mine development and $222,480.64 to mine plant and equipment. On March 2, 1923, the coal in two seams under 30 acres of adjoining land was acquired.

The petitioner's witness estimated that the aggregate amount of recoverable coal was $4,953,000 tons, of which 1,746,779 tons had been mined as of September 30, 1928, and that at the current rate of production the coal will be exhausted in the ensuing 17 years. About 120 men are employed at this colliery.

By agreement between the Director General of Railroads and the petitioner, dated December 27, 1918, it was provided that the latter's interest in the Howard and Vulcan collieries should be considered as included in the description of properties taken over by the President, and that as

compensation for the leasehold right assigned to the director general the latter should pay 5 per cent per annum on the capital expenditures together with certain depletion and depreciation charges. The agreement further provided, however, that in view of the emergency character of the Federal control act nothing in the former should be [fol. 25] construed as expressing or prejudicing the future policy of the Federal Government concerning ownership, control, or regulation of the petitioner and that the recitals thereof should not be used as evidence by or against any party thereto in any future proceeding involving acquisition or valuation of the property of the petitioner.

Pond Creek Colliery

This colliery, located on the main line at Williamson, in Mingo County, W. Va., was acquired December 31, 1920, from Pond Creek By-Products Coal Company. The property included five leaseholds of coal land comprising an area of about 1,000 acres, a small surface lease, improvements, equipment and supplies. The leased area carries two coal seams. The portion of the purchase price applicable to capital items was $329,546.22 of which $44,544.53 was allocated to mine development, $132,331.60 to mine plant and equipment, and $152,670.09 to value of leaseholds. The amount last mentioned represents the difference resulting after appraisal of the other items. The petitioner's witness was of the opinion that it was somewhat of the same nature as the $250,000 item at the Howard collieries, but it is being extinguished through depreciation, rather than depletion charges. On August 21, 1924, an additional lease was secured of approximately 1,900 acres of adjacent coal land covering the same seams as in the original acreage, but only one of which has been developed.

It is estimated by the petitioner's witness that the entire acquisition covered 17,500,000 tons of recoverable coal, of which 2,084,217 had been mined as of September 30, 1928, and that at the current rate of production the deposit will be exhausted in 35 years from that date. About 280 men are employed here.

At this colliery and at Vulcan, favorable economic results have been obtained through the delivery of a portion of

the output directly into coaling stations. A witness for petitioner estimated that the cost of transporting coal in railroad cars to coaling stations and elevating into bins is not less than 24 cents per ton. He also stated that the ownership and operation of all the collieries and the familiarity with production costs constitute advantages in the making of contracts for purchased fuel.

Except for the original Howard purchase, all of the coal rights are held under contracts which require payment of current royalties subject, in most cases, to minimum provisions.

In the opinion of the manager of the fuel department it would be impracticable both from the standpoint of physi- [fol. 26] cal production of coal as well as accounting to attempt to segregate the investment in coal rights on an acreage or percentage basis into different classifications with respect to use.

At the time of purchase all of the properties were in actual operation with facilities for the production of a substantial tonnage. Improvements and equipment have been added and the production increased until in 1928, it amounted to 48.1 per cent of petitioner's fuel requirements which average about 3,250,000 tons per annum. The supply on hand ranges from 600 to 2,000 cars. Of the estimated 53,103,000 tons of recoverable coal acquired, 8,476,057 tons had been produced as of September 30, 1928. The rate of production was then normal and although susceptible of being increased it would not be practical to attempt to meet the entire fuel requirements. From the standpoint of service life as well as capacity, the original and present facilities will not be sufficient without additions and replacements to exhaust the available tonnage.

Since the opening transaction, the investment in these collieries has been included in balance sheet account 705 and the expenditures incurred in the production of coal, including charges for depletion and depreciation, have been carried from the fuel-department books to railway operating expenses. The entire output, except for small amounts of coal furnished to mine employees is consumed in carrier operations. Certain miscellaneous-income items consisting of profit on stores patronized by mine employees, net rent from tenant houses occupied by miners, commissions, sale

of mine checks, and unclaimed wages, are carried to income account 502, "Revenues from miscellaneous operations."

Taking into account the last-mentioned items, the cost of production of coal to September 30, 1928, averaged about 31 cents per ton less than that for coal purchased, although since 1923, the difference has averaged less than 10 cents per ton. The introduction of a carrying charge of 6 per cent on the net capital investment would reduce the former figure to about 10 cents per ton and convert the latter into an excess over purchased coal of about 6 cents per ton. The production costs do not include salaries of the manager of the fuel department and his secretary. Materials and supplies used in mine operations are deadheaded over the petitioner's rails, while charges for materials entering capital items include company haul, and merchandise sold through the stores carries full tariff rates.

The net capital investment in all of the collieries as of September 30, 1928, aggregated $2,650,467.28. There was included under mine plant and equipment as of that date a gross investment of $539,143.09 in tenant houses necessarily provided for mine employees.

[fol. 27] As a result of conditions prevailing in the coal industry, the manager of the fuel department was of the opinion that these collieries could have been purchased in 1928 for less than petitioner paid for them.

Classification

We shall first consider the matter of classification of the investment which resolves itself into the question of whether the investment should be included in balance sheet account 705 or, as the petitioner contends, in account 701. The text of these sections with material explanatory notes follows:

701. Investment in Road and Equipment.

This account shall include the accounting company's investment in road and equipment (including that held under contract for purchase) in existence at the date of the balance sheet. The accounting company's records shall be kept in such manner as to show the amount credited to this account subsequent to June 30, 1914, for property retired, the cost of which was included in the account of that date.

705. Miscellaneous Physical Property.

This account shall include the accounting company's investments in physical property other than transportation property assignable to accounts Nos. 701 and 702 ["Improvements on Leased Railway Property"], including hotels, restaurants, commercial power plants, etc., which are entirely distinct from transportation property and are not operated in connection with the transportation service of the accounting company.

Items of Investment

Coal and other mines.
Commercial power plants.
Hotels and restaurants.
Lands and buildings not used in transportation operations.
Lands and other property acquired and held in anticipation of future use.
Mineral and timberlands.
Rails and other track material leased to others.
Sawmills and other manufacturing plants not operated in connection with transportation service.

In general instruction No. 1, of our classification of investment in road and equipment it is stated that the accounts therein prescribed are designed to show the investment of the carrier in property devoted to transportation service.

By section 19a of the interstate commerce act, we were directed among other things to inventory the property of carriers subject to the provisions of the act; to report certain costs and values with respect to property owned or used for purposes of a common carrier; and to show separately the property held for purposes other than those of a common carrier.

In Texas Midland Railroad, 75 I. C. C. 1, 160, we said:

The property of a railroad company may consist and usually does consist both of that which is used for transportation purposes and that which is not devoted to the [fol. 28] public service but is strictly private property. The valuation act requires the commission to report the entire property, both that which is used for transportation purposes and that which is not. The former is usually denominated carrier, the latter noncarrier.

By section 15a of the act we were directed to prescribe rates yielding as nearly as may be a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. It was also provided that the value finally ascertained pursuant to section 19a for the railway property of any carrier so held and used should be deemed the value thereof for the purpose of determining the aggregate value referred to.

In San Pedro, Los Angeles & Salt Lake R. R. Co., 75 I. C. C. 463, 507, we stated:

It is quite evident, * * * that in enacting paragraph 15a of the act Congress intended that one of the purposes for which we should ascertain and report the value of the property of common carriers was to arrive at a base for determining the fair return to which carriers were declared to be entitled, and the amount of excess, if any, in their earnings which it became our duty to recover.

And after referring to Smyth v. Ames, 169 U. S. 466, and San Diego Land & Town Co. v. National City Co., 174 U. S. 739, 757:

These decisions, which have been followed in all later decisions of the court, clearly indicate that when rates are under consideration all calculations must be based upon (1) property being used by the carrier for the public convenience and (2) the present value of that property; that is, its value at the time it is being used for the public. Congress was, of course, aware of these decisions when it enacted Section 19a, and it is proper to assume that the doctrine of these cases led it to provide that the property owned or used by a common carrier for its purposes as a common carrier should be treated separately from property held for purposes other than those of a common carrier in respect to the ascertaining and reporting of the value we were required to make by the act.

The petitioner insists that these properties do not fall within the scope of account 705, on the ground that they are "operated in conection with the transportation service of the accounting company." On the contrary it is clear that the clause of the text of that account beginning with the word "including" is descriptive rather than restrictive.

It is further contended that if these collieries are comprehended by the text of account 705 the classification should be revised so that they will be excluded therefrom and included in account 701. This brings us to the fundamental question as to whether or not the collieries are transportation property. In the determination thereof we shall have recourse to such light as may be reflected by an examination into the propriety of including them in the rate base, which, as we have seen, involves closely analogous if not substantially identical principles.

[fol. 29] The investment in these collieries comprises in general two classes of property, certain rights with respect to unmined coal, and the facilities used in extracting and delivering the coal for consumption by the railway. The former constitute wasting assets while the latter are renewable.

Coal is directly and immediately consumed in furnishing transportation. In this respect it is readily distinguishable from the items of more or less permanent nature ordinarily included in balance sheet account 701. And this is true notwithstanding that the ultimate difference between supplies and plant may be one of degree depending largely upon the difference in time interval between successive replacements as compared with the ordinary accounting period.

Water for steam purposes is likewise consumed in transportation operations. In San Pedro, Los Angeles & Salt Lake R. R. Co., supra, at page 503, and subsequent valuation cases we have treated water rights used in operation as transportation property. But there is an essential difference between coal rights and water rights. A water right is a thing of more or less permanence, as the supply is ordinarily replenished by nature. The value of a water right as recognized by us represents the value of a permanent right to take a given quantity of water periodically. It is not measured by the value of the water consumed during a particular period nor does it represent the sum of the values of the periodic uses but rather the present worth of the total future uses. On the other hand, a coal right is not of a permanent nature because the exercise thereof results in its extinction. Its value is measured by the whole amount of coal that may be taken thereunder, that is, the

value of the coal itself in place. This is not the capitalized value of a right of periodic use of indefinite duration, but is the value of a use which can be enjoyed but once. While a water right may therefore be said to be in use in its entirety at any given time this is not true as to a coal right covering more than current consumption. In fact the latter represents no more than a potential supply of coal and its sole claim to inclusion as transportation property arises because the coal is destined to be consumed as railway fuel.

In valuation proceedings we have excluded from the reproduction estimates material in nonoperative tracks and further held that property of this character would not be considered as material and supplies until the carrier had shown its intention of using it as such by having it reduced to the form of material or supplies and transferred to and included in the material and supplies account. Chicago, Burlington & Quincy R. R. Co., 134 I. C. C. 1, 47. It is apparent that material of the kind just mentioned is at least as available for use as unmined coal.

[fol. 30] In East Broad Top R. R. & Coal Co., 135 I. C. C. 163, 169, a slag deposit, of which a small portion had been used for ballast, was held to have been classified properly as noncarrier property because greatly in excess of present requirements.

The propriety of including unmined coal in the rate base may also be tested by considering whether it would be includible therein if mined and ready for use. Coal supplies enter the rate base under the element of working capital in the form of a necessary investment in material and supplies and are not considered as being in use prior to their entry into that account. While the determination of this form of working capital is ordinarily based upon the experience of the carrier for a period of years, the amount has been restricted to the normal and reasonable requirements. Rio Grande, El Paso & Santa Fe R. R. Co., 119 I. C. C. 181, 184, 199; St. Louis Southwestern Ry. Co., 149 I. C. C. 371, 385.

In the case of fuel the normal and reasonable requirements for a carrier situated as is the petitioner would not be in excess of a few weeks' supply. The record shows that during the period in question the carrier has held in storage a relatively small supply of coal. The inclusion of several years' supply as working capital would not be considered reasonable and, while there is of course a great difference

in the necessary investment per ton, the inclusion in the rate base of a corresponding supply of unmined coal would be a manifest circumvention of the principles underlying the determination of working capital.

But if it were assumed for the purpose of the argument that the production of coal by the petitioner for its own railway operations is a transportation function, it is clear that the portion of the investment representing coal to be mined in the future is not used in the same manner as that which represents coal currently mined. Before including in the rate base property held for future use it is proper to inquire why its acquisition can not be postponed until it is needed. If suitable mining rights can be obtained when required at not to exceed the necessary present outlay plus proper carrying charges, there is no occasion to purchase them in advance. Generally speaking, the only measurable advantage to be gained from purchasing substantially in advance of railway needs must depend upon the price at which the rights are obtainable as compared with prices likely to prevail during the period of exhaustion of the coal deposit; although it is recognized that from the standpoint of colliery operation it may not only be desirable but necessary to provide reasonable assurance of spreading the unsalvageable cost of the necessary machinery and equipment over a substantial tonnage in an economical manner. If the price level remains the same or decreases, the investment will have [fol. 31] proved to be improvident, while if the price level advances, the investment turns out to be a prudent one. In any event the question arises whether the charges to operating expenses with respect to the coal should reflect the cost of mining rights at the new or original level. Manifestly, if the rate payers are to be burdened by carrying an unwise investment they should be in a position to obtain the advantage of a prudent one. But this can not be accomplished if the coal for future needs is carried in the rate base because in such case the carrier only is in a position to profit by the advance purchase. Re Chesapeake & Potomac Telep. Co., P. U. R. 1926-E, 481, 502, affirmed sub. nom. Chesapeake & Potomac Teleph. Co. v. Commonwealth, 147 Va. 43. See also Spring Valley W. Co. v. City & County of San Francisco, 165 Fed. 667, 697.

In New York Central R. Co., 27 Val. Rep. 1, 44, with reference to land held by a carrier in excess of present needs we said:

Only in exceptional instances should there be a departure from the general rule that only property actually devoted to transportation service is includible in the rate base. When lands are appraised for rate-making purposes at their present value, the carrier receives the benefit of the appreciation occurring between the time when they are acquired and when they are actually put into service; and, so far as the public is concerned, it makes little difference whether the lands were acquired at a small cost in the early period of development or after the development has taken place they have attained a high value. In both instances the rate payers must provide a return upon the present value.

Thus in the instant case up to the time that the coal is actually reached in the process of mining the value at which the right to mine it is included in the rate base would not be measured by the petitioner's outlay therefor but would be subject to adjustment to the current level. In the meantime the rate payers would have paid the carrying charges thereon in the form of a return on the aggregate railway property so that the only advantage accruing to them, even in case of a decline in values, would be that of a diminishing burden with respect to property not actually used in serving them.

Hence the case of City of Spokane v. N. P. Ry. Co., 15 I. C. C. 376, 407, relied upon by the petitioner, does not aid its contention. There it was held that coal lands owned by a subsidiary should not be included in the rate base when a return was being earned on the property by reason of the price at which coal therefrom was charged to operating expenses. It is true that we indicated that those lands were of the very first importance to the railroad and that it might have been wise and proper to make such provision for the future. It should be observed, however, that we further remarked that in that case the public could not well find fault if it were compelled to pay interest upon whatever outlay was reasonably necessary. That case was decided before Minnesota Rate Cases, 230 U. S. 352, 439, and was [fol. 32] referred to therein in connection with the following comment upon the capital obligations of the Northern Pacific:

They include assets of considerable value (for example, the stock of the Northwestern Improvement Company,

owning extensive coal lands), which, however, do not form part of what may be called the operating property of the company, or that devoted to the public service, upon which the fair return is to be calculated.

In the case of the mining facilities, which are actually in current use, it would not ordinarily be of great consequence as between the petitioner and its patrons whether they were included in or excluded from the rate base, provided in the latter case, the patrons pay a return thereon in some form or other. Either regulation on the one hand or competition on the other would tend to make the burden reasonable.

However, since the record shows that the investment in mining rights is not susceptible of segregation between present needs and future reserves, and practical considerations require that the classification of the investment therein be likewise applied to the facilities used in mining, it seems that both should be so classified as to exclude them from the rate base.

In New York Central R. Co., supra, at page 46, we made the following statement:

It may well be that it would be more expedient to regard all of the non-transportation affairs of carriers as merely incidental to the conduct of railroad service, and accordingly to classify all of the property owned as common carrier, at the same time intermingling the revenues received with the revenues from railroad operation. But the law is otherwise.

Transportation is very obviously in a different situation from any other activities and it is not to be lightly assumed that Congress has intended to confer the advantages or disadvantages incident to transportation character upon all property that chances to be owned by a carrier, or to say that the coal mining industry in so far as it is conducted by or for common carriers for their fuel purposes is itself transportation.

There is a well-recognized distinction between the function performed by a carrier in serving the public by means of facilities used in transportation operations and that performed in serving itself in the construction or production of such facilities. The railroad of a carrier is, of course,

a facility employed in its service as a common carrier, but if it chooses to build its own road it is not acting as a common carrier in so doing. Santa Fe P. & P. R. Co. v. Grant Bros. Construction Co., 228 U. S. 177, 186.

By analogy it would seem that the production of coal for consumption in the performance of common-carrier service is no more a common-carrier function than the building of the road itself.

[fol. 33] The mining of coal has usually been referred to and considered as a distinct industry or branch of trade. United States v. Delaware, L. & W. R. Co., 238 U. S. 516, 525, 536; Rates for Transportation of Anthracite Coal, 35 I. C. C. 220, 46, 50, 55; Assigned Cars for Bituminous Coal Mines, 80 I. C. C. 520, 547. The property and business of the mining operator or the miner are not devoted to public use or clothed with a public interest. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 537.

Mining, like manufacturing, is a local business, subject to local regulation and taxation. Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 178.

The petitioner in the conduct of its mining, conforms to State laws with respect to the manner of mining and the relation of master and servant. These mines are taxed separately from its railroad property. The mine employees are not allowed passes and do not submit their wage disputes to the Board of Mediation.

The mining of coal is not interstate commerce, nor is mining commerce at all. Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 444; United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 407; Oliver Iron Mining Co. v. Lord, supra, at page 178; Hammer v. Dagenhart, 247 U. S. 251, 272; Kidd v. Pearson, 128 U. S. 1.

The character of the business of mining in this regard is intrinsic and persists even though conducted in close connection with interstate commerce. Oliver Iron Mining Co. v. Lord, supra, at page 178.

In Delaware, L. & W. R. Co., v. Yurkonis, supra, the plaintiff alleged that he was injured while employed in interstate commerce as a miner in a colliery owned and operated by the defendant for the production of coal to be used in its locomotives employed in its business as a common carrier in interstate commerce. The court held that these

allegations showed that the injury did not occur in interstate commerce, saying:

> The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce,—facts essential to recovery under the [Federal] employees' liability act.

That the court, in so deciding, impliedly held that the mining operations did not constitute commerce or transportation at all, is disclosed by an examination of other cases under the act referred to, particularly Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 558. This case established the test of employment in interstate commerce as depending upon whether the employee was engaged in interstate transportation, or in work so closely related to it as to be practically a part of it. There the plaintiff had [fol. 34] been injured while engaged in altering the location of a fixture in a machine shop for repairing parts of locomotives used in both interstate and intrastate transportation. Applying the test, the court held that the work in which plaintiff was engaged, "like that of the coal miner in the Yurkonis case, was too remote from interstate transportation to be practically a part of it." It was, of course, equally remote from intrastate transportation.

The conclusion is irresistible that the court in deciding the Yurkonis case did not consider that the production of coal by the carrier for its own use constituted a function of transportation because if it were such, its character was clearly interstate. In other words, it is apparent that the court has distinguished mining from transportation as definitely as it has distinguished it from commerce.

Section 1 (12) of the interstate commerce act contains the following provision:

> It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply.

In Assigned Cars for Bituminous Coal Mines, supra, 536, 562, we referred to the means employed by the railroads in securing coal for fuel purposes, including ownership of mines and contracting for the entire output of certain mines for definite periods. The conclusion in that case was that all cars, including those for loading railway fuel, should be distributed pro rata to all the mines served by a railroad within the same division or district.

On further hearing, 93 I. C. C. 701, 714, 737, it was expressly held that the placing of cars at carrier-owned and output-contract mines was within the purview of the portion of the act above quoted and that such mines are "served" by the owning or contracting railroad. The findings made in the previous report were affirmed and in stating the conclusion explicit reference was made to all mines whether owned or leased by or furnishing their entire output to a railroad.

In Assigned Car Cases, 274 U. S. 564, a decree enjoining the enforcement of the order entered in the foregoing case, 9 F. (2d) 429, was reversed and the order approved with respect to the distribution of coal cars at all mines. The court observed that the rule prevents "any mine (including one operated by a railroad) from securing, at the particular time, more than its ratable share of the aggregate available coal transportation facilities." It further stated that limiting the use of private cars did not involve regulation of the coal-mining industry; that "so far as concerns foreign railroad fuel cars the owner is obviously in the same position as a private shipper"; and that "carrying [fol. 35] coal by a railroad for its own use, as fuel, is likewise transportation."

These cases show that a carrier-owned mine is considered not as a part of the instrumentalities of transportation but as a shipper; that with respect thereto the railroad, in its capacity as such, serves itself in its capacity as a mine and transports the products thereof; and that in its capacity as a railroad it can not lawfully prefer itself as a mine. The separation and distinction thus drawn between the two activities could hardly be more complete.

The doctrine of these cases is inconsistent with the idea that mines owned and operated by a carrier for its fuel purposes, or output-contract mines, are classifiable as rail-

way property held for or used in the service of transportation. Attention has been directed to output-contract mines because, so far as the use of their product is concerned, they are in the same category as the mines here involved. Since use rather than ownership is recognized as the test of whether property is carrier or noncarrier, the reach and consequence of the classification sought by the petitioner also furnish a cogent argument against its propriety.

Viewed in this light, the case of Chicago, Burlington & Quincy R. R. Co., supra, at page 30, furnishes authority against the petitioner. There we declined to classify as carrier property certain coal rights owned by the carrier on valuation date but shortly thereafter conveyed to a coal company whose entire capital stock was owned by the carrier. The report contains the following comment:

Although the coal is used exclusively by the Burlington for carrier operation, yet the transaction is not strictly carrier. It is true the public benefits by the control of the Valier Coal Company by the carrier in that the latter may use this control as a leverage in obtaining coal from the commercial companies at a lower price, thereby accomplishing economies in operating expenses. Yet the indirect benefits derived by the Burlington, through ownership of the coal- company stock, do not make the lands owned by the coal company carrier property. The coal company is engaged in the business of producing coal. The fact that the coal is paid for by the carrier and used in its operation does not bring the property owned by the coal company within the classification of carrier property for valuation purposes.

With respect to the classification of lands as between carrier and noncarrier use we have said, Texas Midland Railroad, supra, at page 163, that our rule is much the same as that laid down by the courts in permitting condemnation of lands for carrier purposes. This furnishes a definite criterion and there are numerous authorities supporting a noncarrier classification of the property in question. The use made of these mines is not sufficiently in the nature of a public use to have authorized condemnation thereof, because a railroad company can not condemn private property for purposes not essential to the construction, maintenance, [fol. 36] or operation of its road, 20 C. J. 567, sec. 48; 1 Lewis, Eminent Domain, third ed., sec. 263.

Both of these authorities cite Eldridge v. Smith, 34 Vt. 484, in which the question as to what lands owned by a railroad company may properly be said to form a part of the railroad itself or its appurtenances so as to be covered by a conveyance thereof, was resolved by testing whether their connection with and use by the railroad was such that they could have been taken under the power of eminent domain. The opinion (page 493) contains the following pertinent language:

Is an establishment for the manufacture of railroad cars a legitimate railroad purpose, so that the company would have a right to take land for it against the will of the owner? The defendants say, that as the company must necessarily have cars in order to carry on their business, therefore they must have the right to manufacture them, and have works for that purpose. But this argument proves too much. Railroads must have iron, in great quantities, for their track and other purposes. Does this authorize them to take ore beds and lands for forges and foundries, and manufacture their own iron? They must have wood, sleepers, and timber for depots and large quantities of lumber of various kinds. Does this authorize them to take timbered lands, and sites for mills, against the will of the owners?

They must have glass, nails, paints, and many other things. Can they by compulsory measures provide themselves the means to manufacture them all? We think it very clear they can not. If the company must manufacture their own cars or go without, then, doubtless, their manufacture would be regarded as a necessity of the railroad, *but the manufacture of cars and engines is a distinct branch of mechanical industry, carried on wholly independent of any connection with railroads, and is a branch of business in which railroad companies do not usually engage at all;* and in this case it seems quickly demonstrated, that it was better to rely on supplying themselves with cars by purchase from those whose legitimate business it was to make them.

Although railroad companies must have engines and cars, iron, lumber, wood, and many other things in large quantities, in order to build and operate their roads, it is supposed they can supply themselves as private persons do,

by purchase in the ordinary way, and they are not created or designed to be independent of all other branches of industry and business in the country, but to be additional aids to their successful development. The companies must have shops for the repair of cars and engines, as they are so often needed, and as they can not well be moved for repairs, nor can facilities be found for repairs in the country generally, but the company were already supplied with all necessary accommodations for repairs. We are of opinion that an establishment for the manufacture of cars is not a legitimate railroad necessity, so that the company could properly condemn land on which to erect one. [Italics ours.]

The same test has been applied to determine what particular physical property of a railroad company did not constitute transportation property and was therefore taxable, where the charter or other governing law after prescribing certain transit duties or analogous imposts created an exemption from all further taxation. State v. [fol. 37] Commissioners of Mansfield, 23 N. J. L. 510; Railroad v. Berks County, 6 Barr. (Pa.) 70; Inhabitants of Worcester v. Western R. Corp., 4 Met. (Mass.) 564; Vermont Central R. Co. v. Town of Burlington, 28 Vt. 193; Milwaukee & St. Paul Ry. Co. v. City of Milwaukee, 34 Wis. 271.

Accounting

If the collieries are classified as nontransportation property and the investment included in balance sheet account 705, the expense of operating them should, in accordance with the effective accounting classifications, be included in account 534, "Expenses of miscellaneous operations," the taxes thereon should be included in account 535, "Taxes on miscellaneous operating property," and the revenues derived therefrom should be included in account 502, "Revenues from miscellaneous operations." The charges to account 716, "Material and supplies," for coal produced in these collieries for consumption in the petitioner's transportation operations should be upon the basis of the average monthly cost per ton for producing the coal. It follows, also, that the petitioner's accounts for transportation operations should include proper credits on ac-

count of transportation or other services rendered by the railway for the benefit of the collieries.

In order that we may properly supervise this accounting, we shall also require the petitioner to submit to us each month a detailed statement of the cost of each of its colliery operations; of the tonnage of each of the grades, kinds, and sizes of coal produced in each colliery; of the cost per ton of each of such grades, kinds, and sizes, showing how these costs were arrived at; and of the prices per ton, if any, paid during the month by petitioner for similar grades, kinds, and sizes of coal purchased under contract within the same general locality. If study of these reports should indicate that it is necessary, we shall reopen this proceeding for the purpose of considering and further regulating the accounting under which the costs per ton are ascertained.

We find that the collieries involved are not transportation property and that the investment therein should be included in balance sheet account 705, "Miscellaneous physical property." We further find that the accounting for the operation of such collieries, and for the coal produced therein and used in petitioner's transportation operations, should be in accordance with the effective accounting classifications, as above set forth. An appropriate order will be entered.

[fol. 38] Order

At a Session of the Interstate Commerce Commission, Division 4, Held at Its Office in Washington, D. C., on the 5th Day of January, A. D. 1931

Ex Parte No. 100

In the Matter of a Uniform System of Accounts to be Kept by Steam Railroads

A hearing and investigation of the matters and things involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the investment of the Norfolk and Western Railway Company in the Howard, Vulcan, and

Pond Creek collieries, including commercial store stocks maintained at these collieries, shall, in accordance with the provisions of the effective accounting classifications, be classified as investment in miscellaneous or nontransportation property and included in balance sheet account 705, "Miscellaneous physical property."

It is further ordered, That the expense of operating the aforesaid collieries and stores shall be included in account 534, "Expenses of miscellaneous operations," that the taxes thereon shall be included in account 535, "Taxes on miscellaneous operating property," and that the revenues derived therefrom shall be included in account 502, "Revenues from miscellaneous operations," all in accordance with the effective accounting classifications.

It is further ordered, That the charges to account 716, "Material and supplies," for coal produced in these collieries for consumption in the petitioner's transportation operations shall be upon the basis of the average monthly cost per ton for producing said coal.

It is further ordered, That credits in accordance with the lawful published tariff rates shall be included in the railway operating revenue accounts for the transportation over the railway of the Norfolk and Western Railway Company of men, material, and supplies (including commercial store merchandise) incident to the operation of the aforesaid collieries and stores; and that credits shall be made to the railway pay roll and material and supplies accounts [fol. 39] to cover the direct costs (together with fair allowances to cover overhead expenses not directly assignable) of work done in the shops of the railway company for the benefit of these collieries.

It is further ordered, That the Norfolk and Western Railway Company shall submit to the commission within 30 days after the close of each month a detailed statement showing, for said month, the cost of each of the aforesaid colliery and stores operations; the tonnage of each of the grades, kinds, and sizes of coal produced in each colliery; the cost per ton of each of such grades, kinds and sizes, showing how these costs were arrived at; and the prices per ton, if any, paid during the month by it for similar grades, kinds, and sizes of coal produced under contract within the same general locality.

And it is is further ordered, That our order in this proceeding of January 14, 1928, be, and it is hereby, vacated.

By the commission, division 4.

George B. McGinty, Secretary. (Seal.)

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA—Filed June 30, 1931

United States of America, one of the defendants in the above-entitled cause, for answer to the petition filed therein against it, answers and says:

I

United States admits, for the purposes of this suit, the allegations of paragraphs numbered 1, 2, and 3, of the petition.

II

Answering paragraphs numbered 4, 5, 6, 7, and 8, of the petition, United States admits that the several sections of the Interstate Commerce Act, mentioned in those paragraphs, respectively, contain provisions and requirements substantially as set forth and alleged in said paragraphs, but United States respectfully refers the Court to the entire language of said sections for full and complete information concerning their provisions and requirements [fol. 41] (U. S. Code, Tit. 49, Sects. 19a, 15a, 20, 10).

III

United States admits that the allegations contained in paragraph numbered 9 of the petition are true.

IV

United States admits that the Interstate Commerce Commission made and entered the orders mentioned in paragraphs numbered 10, 11, and 12, of the petition, upon evidence adduced at the proceedings and hearings described in said paragraphs, and admits further that said para-

graphs and the several sub-divisions thereof contain a substantially correct statement of the findings and requirements made and contained in said orders; but, for full and complete information, United States respectfully refers the Court to the full text of the Commission's report, containing its statement of facts, findings, orders and requirements in the premises, which said report and order are annexed to the petition as "Exhibit A" and is hereby referred to and made a part of this answer.

V

United States denies each and all of the matters, things and conclusions alleged in paragraphs numbered 13, 14, and 15, of the petition.

VI

Answering paragraph numbered 16, United States admits that the substance of the facts therein stated appear in the Commission's report; but denies that the facts alleged in said paragraph 16 constitute all the facts set forth and contained in said report, and, for a full, complete and accurate statement of all the facts set forth, weighed and considered by the Commission in said report, United States respectfully refers the Court to the full text of said report, [fol. 42] annexed as "Exhibit A" to the petition, which said exhibit is hereby referred to and made a part of this answer.

VII

United States, for answer to the matters, things and conclusions alleged in paragraphs numbered 17 and 18, denies that said paragraphs fully, accurately or fairly state the substance of the evidence which was before the Commission; and, United States demands, upon trial of this cause, strict proof of the allegations of said paragraphs.

VIII

United States denies the matters, things and conclusions alleged in paragraph numbered 19 of the petition.

IX

Answering paragraphs numbered 20, 21, and 22, of the petition, United States admits that paragraph (2) of said section 15a provides that:

In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.

But, United States denies that the Commission's said order is null, void and of no effect for the reasons alleged in said paragraphs, or for any other reason; and United States particularly denies that said order is or will be in contravention of any legal right of petitioner under any statute or the Constitution of the United States, or any amendment thereto.

[fol. 43]

X

United States denies each and every allegation made and contained in paragraph numbered 23 of the petition.

XI

Answering paragraph numbered 24 of the petition, United States admits that failure of refusal by petitioner to comply with said order of the Commission may subject petitioner to forfeitures and penalties provided by the Interstate Commerce Act in such cases.

XII

Further answering the petition, and particularly paragraphs 20, 21, 22, and 23, thereof, United States expressly denies that said order of the Commission is null, void and of no effect, and denies that it is unlawful in any respect for the reasons set forth in those paragraphs of the petition, or for any other reason.

XIII

Except as herein expressly admitted, United States denies each and every allegation of the petition, and further

denies each and every fact, conclusion, and inference therein alleged which is or may be inconsistent with or contrary to the facts stated and found, and the conclusions reached by the Commission and set forth in its said report annexed to the petition as "Exhibit A" and hereby referred to and made a part of this answer.

Wherefore, having fully answered the petition, United States prays that the relief therein prayed be denied and the petition dismissed with costs to the petitioner, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins, Special Assistant to the Attorney General. John Lord O'Brian, Assistant to the Attorney General. John Paul, United States Attorney.

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed July 4, 1931

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, hereinafter referred to as the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs (1) to (3), inclusive, of the petition, the Commission admits that the allegations therein contained are true.

II

Answering paragraphs (4) to (8), inclusive, of the petition, the Commission denies that the provisions of the Interstate Commerce Act therein referred to are fully and cor-

rectly stated and respectfully refers the Court to the text of said act for full and correct information in the premises.

[fol. 45] III

Answering paragraph (9) of the petition, the Commission admits and alleges that it has prescribed a uniform system of accounts to be kept by steam railroads, including accounting regulations entitled "Classification of Investment in Road and Equipment of Steam Roads" and "Classification of Income, Profit and Loss, and General Balance Sheet Accounts for Steam Roads," certified copies whereof are hereto attached, marked Exhibits "A" and "B" respectively; and that therein it provided for the accounts referred to in said paragraph, namely, account 701, "Investment in Road and Equipment" and account 705, "Miscellaneous Physical Property." The Commission denies that said paragraph of the petition fully and correctly states the provisions of said accounting regulations in respect of said accounts and respectfully refers the Court to said accounting regulations for full and correct information in the premises.

IV

Answering paragraphs (10) to (24), inclusive, of the petition, the Commission admits and alleges that on or about January 14, 1928, it entered in the proceeding known as "Ex Parte No. 100, In the Matter of the Uniform System of Accounts to be kept by Steam Railroads", an order reading as set forth in paragraph (10), subsection (a), of the petition; that, following the filing in said proceeding by petitioner of the petition referred to in paragraph (10), subsection (b) of the petition herein, and on or about July 24, 1928, it entered a supplemental order postponing indefinitely the effective date of its said order of January 14, 1928, and assigning the matters dealt with therein for hearing; that subsequently it conducted an investigation and accorded to petitioner full hearing in the premises; that at [fol. 46] said hearing a large volume of testimony and other evidence bearing upon the matters involved was introduced in the proceeding by the petitioner and by the Commission's Bureau of Accounts and its Bureau of Valuation; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said

matters were fully argued and submitted to the Commission for determination, whereupon the Commission determined the said matters, and entered and served upon petitioner the report and order of January 5, 1931, referred to in paragraph (11) of the petition herein, of which a true copy is attached to said petition marked "Exhibit A"; that said report and order of January 5, 1931, included the Commission's findings of fact, decision, conclusions and orders in the premises; that upon the evidence before it, as shown in and by said report and order, the Commission made the findings and stated the conclusions upon which said order is based. The Commission further alleges that such findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence before it in said proceeding.

Particularly answering paragraph (16) of the petition, the Commission denies that there is set out therein a full, true or correct statement of the facts appearing upon the face of the Commission's report, and the Commission respectfully refers the Court to the text of its said report as set out in Exhibit A to the petition herein, for a complete statement of said facts.

Particularly answering paragraph (22) of the petition, the Commission admits that there is now pending before it a proceeding entitled "Finance Docket No. 3865, Excess Income of the Norfolk & Western Railway Company," wherein, pursuant to the terms of Section 15a of the Interstate Commerce Act, it has ordered petitioner to pay to it excess income found to have been earned for the years 1924, [fol. 47] 1925 and 1926. Except as so expressly admitted, the Commission denies each of and all the allegations contained in said paragraph (22). Further and affirmatively answering said paragraph (22), the Commission alleges that petitioner has filed its protests against the tentative orders entered in said above-mentioned excess income proceeding and the questions thereby raised are now in process of determination in said proceeding; alleges that it has not, by its order herein involved, undertaken to inventory petitioner's property or report any costs or values thereof pursuant to the terms of Section 19a of the Interstate Commerce Act; and alleges that it has not, by its order herein involved, undertaken to adjust any rates or ascertain and recover any excess income pursuant to the terms of Section 15a of said Act.

Further answering paragraph (23) of the petition, the Commission denies that its order of January 5, 1931, is unlawful or void for any of the reasons therein stated or for any other reason.

The Commission further alleges that its aforesaid finding and conclusions as set forth in said report and order of January 5, 1931, Exhibit A to the petition herein, were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the Commission in the proceeding in which said order of January 5, 1931 was made.

The Commission further alleges that in making its said report and order of January 5, 1931, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition shown by the evidence including matters covered by the allegations of the petition herein.

The Commission further alleges that its order aforesaid was not made arbitrarily or unjustly, or contrary to the relevant evidence, or without substantial evidence to sup-
[fols. 48 & 49] port it; that in making said order the Commission did not exceed the authority which has been duly conferred upon it or exercise that authority arbitrarily or in an unreasonable manner, and the Commission denies each of and all the allegations to the contrary contained in the petition herein.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in said petition in so far as they conflict with the allegations herein, or with either the findings or the conclusions of fact included in said report of January 5, 1931. The Commission particularly alleges and states that the petitioner would suffer neither irreparable loss nor injury, nor loss or injury of any kind by reason of its compliance with said order of January 5, 1931.

All of which matters and things the Commission is ready to aver, maintain and prove, as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by Nelson Thomas, Attorney. Daniel W. Knowlton, of Counsel.

Duly sworn to by Balthasar H. Meyer. Jurat omitted in printing.

[fol. 50] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

NORFOLK & WESTERN RAILWAY COMPANY, Petitioner,

v.

UNITED STATES OF AMERICA & THE INTERSTATE COMMERCE COMMISSION, Defendants

Statement of Evidence—Filed Feb. 3, 1932

CAPTION

Proceedings had on July 20th, 1931, at Roanoke, Virginia, before the Honorable Henry C. McDowell, Judge of said Court, with whom were associated the Honorable John J. Parker, United States Circuit Judge for the Fourth Circuit, and the Honorable Luther B. Way, United States District Judge for the Eastern District of Virginia

APPEARANCES

Messrs. S. K. Funkhouser, D. Lynch Younger, and Harvey B. Apperson, counsel for plaintiff; Elmer B. Collins, Esq., for the United States; Nelson Thomas, Esq., for the Interstate Commerce Commission.

[fol. 51] OFFER IN EVIDENCE

Counsel for both the Petitioner and the Defendants announcing that they were ready for trial, the Petitioner offered, and there was received in evidence, a certified copy of the testimony at the hearing before the Interstate Commerce Commission, with Exhibits; the same in said record being entitled "In the Manner of Uniform System of Accounts to be Kept by Steam Railroads in re Petition of Norfolk & Western Railway Company", at Washington, D. C., between December 17, 1928 and February 20, 1929. A condensed statement of which said record is as follows:

GEORGE DUNGLINSON, JR., was called as a witness on behalf of the Norfolk & Western Railway Company and, being duly sworn, testified as follows:

I have been connected with the Norfolk & Western Railway Company since 1908; from 1908 to the early part of 1917 I was on its Car Allotment Commission, first, as a member and later as Chairman of the Commission. In the early part of 1917, at the time the Railway Company acquired title to its coal mines, I was appointed Assistant to General Manager and placed in charge of the Fuel Department. Thereafter—in June, 1920—my title was changed to Manager Fuel Department.

I am familiar with the purchase and operation of the coal properties and other matters pertaining to the fuel supply of the railway company.

[fol. 52] The Norfolk & Western Railway Company owns the following coal properties, to-wit:

Howard Collieries, Vulcan Colliery, and Pond Creek colliery.

The Howard Collieries purchased April 19, 1917 is composed of three (3) contiguous plants located near Chattaroy, West Virginia in the Kenova Coal District on the Howard Branch—a short branch connecting with the main line at Chattaroy.

The Vulcan Colliery located on the main line of the Norfolk & Western Railway Company at Vulcan, West Virginia, in the Thacker Coal District, was purchased June 1, 1917.

The Pond Creek Colliery acquired December 31, 1920, is located in the Thacker Coal District, near Williamson, West Virginia, adjacent to and connected with the terminal yards at Williamson, West Virginia.

The original Howard Collieries purchase consisted of mining rights, free of royalty on 2,875 acres of coal lands, together with improvements and equipment. Three coal seams were then, and are still being, mined within this area. On January 1, 1924, the company acquired a lease on approximately 66 acres of adjacent coal land carrying one seam, and on May 25, 1925, acquired an additional lease of 2,412 acres of adjacent land covering mining rights on continuations of the three seams in the original purchase. All seams are now being worked.

Vulcan Colliery at time of purchase consisted of four leaseholds on coal land, additional leases on small tracts of surface land, together with improvements and equipment,

[fol. 53] the coal leases making up a boundary of land aggregating a little less than 900 acres. The property carries 5 coal seams, the Vulcan, Lower Glen Alum, Upper Glen Alum, Lower Thacker and Upper Thacker seams. When purchased four seams were being mined, the fifth one being subsequently opened.

On March 2, 1923, an additional lease on 30 acres of adjoining land carrying the Upper and Lower Thacker seams was acquired.

Pond Creek Colliery at time of purchase consisted of five leaseholds on coal lands, making up a boundary of slightly over 1,000 acres, a surface lease on a small area of land, together with improvements and equipment. The leased area carries two coal seams, the Pond Creek and Thacker, which were then being worked and are still being developed.

On August 21, 1924, an additional lease on approximately 1,900 acres of adjacent coal land was acquired, which lease carries the same two coal seams, but only the Thacker seam has yet been developed.

At time of purchase all the properties acquired were in actual operation and had mine development, improvements, equipment and other facilities for the production of a substantial coal tonnage. Since purchase, the Railway Company has added improvements and equipment as well as acquired the additional coal leases described, whereby the production of the mines has been greatly increased.

Here, the witness offered a set of maps of the Howard [fol. 54] Collieries consisting of 20 sheets, which set of maps received in evidence was marked: "Carrier's Exhibit No. 1, Witness Dunglinson".

A similar set of maps of the Vulcan Colliery consisting of 7 sheets offered and admitted in evidence, marked: "Carrier's Exhibit No. 2"; also a similar set of maps of the Pond Creek Colliery consisting of 8 sheets, was offered and received in evidence, marked: "Exhibit No. 3".

(Exhibits 1, 2 and 3 omitted from printing by stipulation of counsel).

On these maps two distinctive colors appear, one color (pink) shows the mine workings and improvements, consisting of tipples, tramroads, houses and other necessary fixed facilities as of the date of purchase. The other color (yellow) shows the mine workings since date of purchase and the fixed improvements added by the Railway Company.

The maps also show the boundary lines and extent of mineral ownership. The first set of maps we will look at are the maps of the Howard Collieries. In the upper lefthand corner is a key map to the set of maps. This key map shows, with pink outlines, the original purchase, and the additional leases acquired are shown with yellow outlines. This key map also shows the individual sheets making up the set and what each individual sheet shows.

[fol. 55] For instance, the first sheet of the series is marked "1w". That embraces the area indicated here (indicating); and, if you will notice, after the "1" come the letter "c" and the letter "w". That indicates that within the area of sheet 1 both the Winifrede and Coalburg seams are being worked.

The same scheme is carried out throughout all of the twenty-some maps.

Now, looking at sheet 1 for a moment, which only shows this fraction of the entire boundary (indicating), the pink outline indicates the boundary lines, and all the mine workings are shown in either one of two colors, pink or yellow. The mine working- in pink show the mine workings as of date of acquisition. The yellow shows the extension of the mine workings since that time.

You will see houses and other structures tinted in pink. They were there at the time of purchase. The yellow indicates the improvements added since date of acquisition. If you will notice in the legend here the same scheme is carried out. The pink shows "P. A." there, and in the mine workings legend the pink indicates mine workings up to April, 1917, and the yellow the workings since that time. The symbols also show the difference types of improvements, and so forth. Now, that scheme is carried out throughout all the set of maps.

Sheet 3 is rather interesting. Sheet 3 happens to catch the greater part of the mine camp and village. That is [fol. 56] sheet "3w". There you will see all the houses, fences, walks, tipples, inclines, tramroads and things of that kind generally found in a mining camp, and here designated in one color or the other according to whether it was erected prior to or since date of acquisition. This shaded red border to which you refer indicates the extent of ownership or the boundary line of the property. In other words, everything within this outside border is part

of the property of the Howard Collieries. This particular red line that you indicate here is marked "Junior Supply Incline." This line is two No. 12 galvanized telephone wires. The various lines I have referred to are all shown on Sheet "3w" and are all indicated with letters and words, with the exception of the boundary line, which is a broken line consisting of a long dash and two dots. I shall be glad to explain the other maps, if necessary. They are all prepared with the first sheet as a key map. And with the same legend appearing in each case, with the exception that the maps of the Pond Creek Colliery do not consist of all of the individual sheets shown by the key map. I will explain that. The key map of the Pond Creek Colliery shows a total of twelve sheets, and two of the sheets carrying the mine workings of two seams and the improvements on the same. In other words, the complete set of maps, if carried out as indicated by the key map, would consist of 16 sheets. However, all of the improvements and mine workings are concentrated on sheets 7 and 9. When I said "Sheets 7 and 9" (there are several marked "7" and more than one marked "9") I was referring to the key map. It so happens that all the mine workings and [fol. 57] improvements are concentrated on Sheets 7 and 9 under the proper subdivisions. The only other information that would be shown on a number of the outlying maps would be the boundaries. Instead of showing the boundary lines by these individual sheet numbers, in their place I have substituted one sheet which shows the entire boundary in one tract. That particular sheet is not numbered. It is entitled "Map of Property", etc., and is the last sheet in the Exhibit. All of the mine workings are concentrated on two individual sheets. The sheet which I have just been describing, and which is not numbered, may be identified as an unnumbered sheet following Sheet "9t" in Exhibit No. 3, and (that sheet we have just referred to) has printed on it: "This map shows boundary lines of leaseholds. See other sheets for mine workings and improvements."

There was offered and admitted in evidence a statement showing the prices paid for the various mining properties which statement was marked: "Carrier's Exhibit No. 4"

(Here follows Carrier's Exhibit No. 4, side folio 58)

NORFOLK & WESTERN RAILWAY COMPANY

Exhibit No. 4.
Witness - Dunglinson

STATEMENT SHOWING ACQUISITION COST OF MINING PROPERTIES AND COST OF ADDITIONS AND IMPROVEMENTS TO SEPTEMBER 30th, 1926

	HOWARD COLLIERIES		VULCAN COLLIERY		POND CREEK COLLIERY		TOTAL - ALL COLLIERIES	
QUISITION COST	$ 1,517,684.46	$	$ 424,562.20	$	$ 345,231.10	$	$2,285,477.76	$
Less Operating Items	37,019.15	1,480,665.31	23,369.08	401,193.12	15,664.86	329,566.24	74,073.11	2,211,404.65
ADDITIONS AND IMPROVEMENTS	825,971.21		162,929.00			560,699.00	1,549,599.21	
Less Retirements	98,482.23	727,488.98	1,485.00	161,444.00			99,967.23	1,449,631.98
APITAL INVESTMENT		2,208,154.29		562,637.12		890,265.24		3,661,056.63
Depletion Reserve (minerals)	203,177.15						203,177.15	
Depreciation Reserve (plant)	344,582.91	547,760.06		202,282.03		260,527.26	607,392.20	1,010,569.35
ITAL INVESTMENT		1,660,394.23		360,355.09		629,717.96		2,650,467.28

Howard Collieries acquired April 19, 1917
Vulcan Colliery acquired June 1, 1917
Pond Creek Colliery acquired Dec. 31, 1920

45A

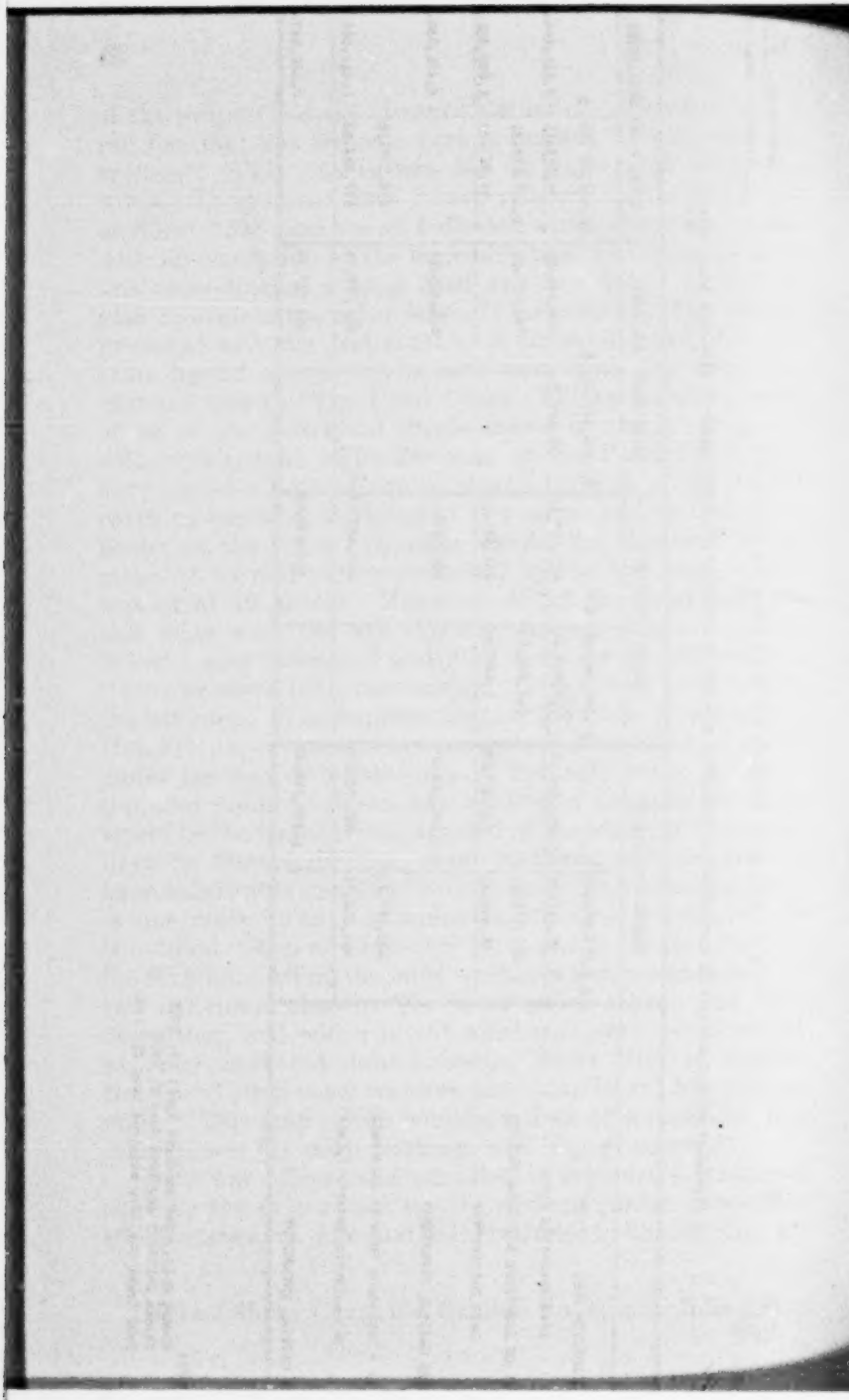
NORFOLK & WESTERN RAILWAY COMPANY

Exhibit No. _
Witness - Dun

STATEMENT SHOWING ACQUISITION COST OF MINING PROPERTIES AND COST OF ADDITIONS AND IMPROVEMENTS TO SEPTEMBER 30th, 1920

	HOWARD COLLIERIES		VULCAN COLLIERY		POND CREEK COLLIERY		POCAHONTAS - ALL COLLIE	
ACQUISITION COST	$ 1,517,684.46	$	$ 424,562.20	$	$ 343,231.10	$	$2,285,477.76	$
Less Operating Items	37,019.15	1,480,665.31	23,369.08	401,193.12	13,664.88	329,566.22	74,073.11	2,211,
COST OF ADDITIONS AND IMPROVEMENTS	825,971.21		162,929.00			560,699.00	1,549,599.21	
Less Retirements	98,462.23	727,488.98	1,485.00	161,444.00			99,967.23	1,449,
GROSS CAPITAL INVESTMENT		2,208,154.29		562,637.12		890,265.22		3,661,
LESS - Depletion Reserve (mineral)	203,177.15						203,177.15	
Depreciation Reserve (plant)	344,582.91	547,760.06		202,282.03		260,527.26	607,392.20	1,010,
NET CAPITAL INVESTMENT		1,660,394.23		360,355.09		629,717.96		2,650,

NOTES:
Howard Collieries acquired April 19, 1917
Vulcan Colliery acquired June 1, 1917
Pond Creek Colliery acquired Dec. 31, 1920



The statement shows the original cost of all collieries was $2,285,477.76, which includes the purchase price paid former owners and incidental expenses in connection with purchases. From this cost is deducted $74,073.11, representing the inventories of supplies, merchandise and other items of an operating nature, leaving $2,211,404.65 as the acquisition cost of the capital or plant items.

The additions and improvements to plants made by the [fol. 59] Railway Company since dates of acquisitions to September 30th, 1928, have cost $1,549,599.21, and the retirements, or credits to plant accounts, during the same time have amounted to $99,967.23, leaving a net cost for additions and betterments of $1,449,631.98.

The credits to plant accounts for depreciation of plant items charged against the cost of production total $807,-392.20, and similar credits for depletion of minerals total $203,177.15, a total for both items of $1,010,569.35, which deducted from the gross cost of properties and improvements leaves a net capital investment as of September 30, 1928 of $2,650,467.28. The distribution of these items between the several collieries is shown by the statement.

The coal properties were purchased to give the Railway Company a source of supply from which to obtain fuel coal of proper quality in dependable amounts at a reasonable cost at locations economically desirable.

The question of ownership and operation of coal mines as a source of fuel supply had been under consideration by the officers of the Railway Company for several years. Reports and statements analyzing the fuel situation, particularly with reference to economies which might be obtained, were submitted and studied. Frequent interruptions in mining in other fields, both in this country and abroad, and industrial development requiring increased coal consumption, particularly pronounced during the World War, created a condition in the coal market for local coals which gravely handicapped the Railway Company in [fol. 60] securing contracts for sufficient amounts of fuel coal regardless of price, and even interferred with the delivery after purchase.

So, in the early part of 1917 when confronted with sharply rising prices of fuel coal and difficulties in obtaining suitable amounts, the Board of Directors authorized the purchase of going coal operations for the protection

of the company. Options on a number of coal properties were obtained and inspections made and reports submitted. The purchase of Howard Collieries and Vulcan Colliery, described in previous testimony, was consummated. The property of Howard Collieries was producing a substantial tonnage at time of purchase, the quality of the coal was attractive and the location was desirable for supplying the west end of the railroad.

Vulcan Colliery was attractive because at this point is located one of the most important coaling stations and the continuation at a reasonable cost of a regular supply of coal direct from the mines to the coaling station at Vulcan was highly desirable.

Pond Creek Colliery was purchased in 1920, the location of the colliery being particularly advantageous. A large modern coaling station was planned for Williamson Yard and erected, and the purchase of Pond Creek Colliery enabled coal to be delivered direct to the station without the use of railroad cars.

The Norfolk & Western Railway Company operates the mines and bears the entire expense of such operation; the cost of coal produced enters into the operating expense of the railway company at the cost of production; and all of the coal produced is used by the railway company for carrier purposes.

[fol. 61] The savings effected through the ownership and operation of these mines is set forth in a statement which I have prepared. This statement was offered and admitted in evidence marked: "Carrier's Exhibit No. 5."

(Here follows Carrier's Exhibit No. 5, side folio 62)

Exhibit No. ____
Witness - Dunglinson

NORFOLK & WESTERN RAILWAY COMPANY

STATEMENT SHOWING PRODUCTION AND COST OF FUEL COAL MINED BY N&W RAILWAY AND SAVINGS THEREBY COMPARED WITH COST OF PURCHASED COAL.

Year	Mined by N. & W.		Average Cost Per Ton Purchased Coal	Savings	
	Tons	Net Cost Per Ton		Per Ton Mined	Amount
1917	254,578.98	$ 1.1888	$2.4778	$1.2225	$ 536,634.71
1918	382,639.41	1.6991	2.5655	.8664	331,525.60
1919	455,934.30	1.8927	2.6018	.7091	323,319.18
1920	211,731.70	3.5545	4.2338	.6793	143,856.41
1921	547,791.42	3.0951	3.5144	.4193	229,682.52
1922	672,117.49	2.0261	2.3985	.5724	250,295.17
1923	874,725.80	2.2487	2.8571	.6084	532,204.54
1924	952,264.74	1.9476	2.1649	.2173	202,588.96
1925	927,514.28	1.6572	1.7151	.0579	55,729.14
1926	1,045,087.24	1.7446	1.7634	.0188	19,672.01
1927	1,108,969.96	1.6198	1.7052	.0854	92,461.25
1928 (9Mos)	1,062,709.05	1.5481	1.6564	.1083	118,298.16
	8,476,057.36				$2,631,445.65

For Respondent.

Interstate Commerce Commission.
No. 1
Carriers
Complainant's
Protestant's
Intervenor's
Defendant's
Respondent's
Applicant's
Commission's
Witness
Reporter
(date) Dec. 17/28 19
Exhibit No. 6.
Dunglinson
Love

Exhibit No. 5 shows the total production in net tons of all collieries by years, the net cost per ton of such production and the average cost per ton of all purchased fuel coal f. o. b. mines for the corresponding years and the savings based upon the difference between the two last-mentioned items multiplied by the tons produced. The total savings from the date of acquisition in 1917 to the end of September, 1928 is $2,631,445.65, which figure is within $20,000.00 of the net capital investment in the property as of the latter date.

The "cost of production" of company mined coal includes all wages and salaries of mine employees, foremen, superintendents and office men, the cost of supplies and materials, royalties, taxes, insurance, power, depreciation, depletion and other items incidental to operation and maintenance. The "mining costs" reflects operating credits from merchandise sales, rents and commissions.

In addition to the savings shown on the statement, the company has obtained favorable economic results through the ownership of the Vulcan and Pond Creek Collieries on account of direct delivery of coal to coaling stations without the use of railroad cars. The estimated cost of transportation in railroad cars to coaling stations and elevating [fol. 63] into bins is not less than 24 cents per ton. The two last-above-mentioned Collieries have delivered direct to coaling stations a total of 2,119,317 tons during the ownership thereof.

At the present, the monthly rate of direct delivery to coaling stations is 12,000 tons at the Vulcan Collieries and 22,000 tons at the Pond Creek Collieries.

I have prepared a statement showing the total requirements of fuel coal, the production of company mined coal and the relation of the latter to the former by years.

This statement was offered and admitted in evidence and marked: "Carrier's Exhibit No. 6."

(Here follows Exhibit No. 6, side folio 64)

Exhibit No. 6
Witness - Dunglinson

NORFOLK & WESTERN RAILWAY COMPANY

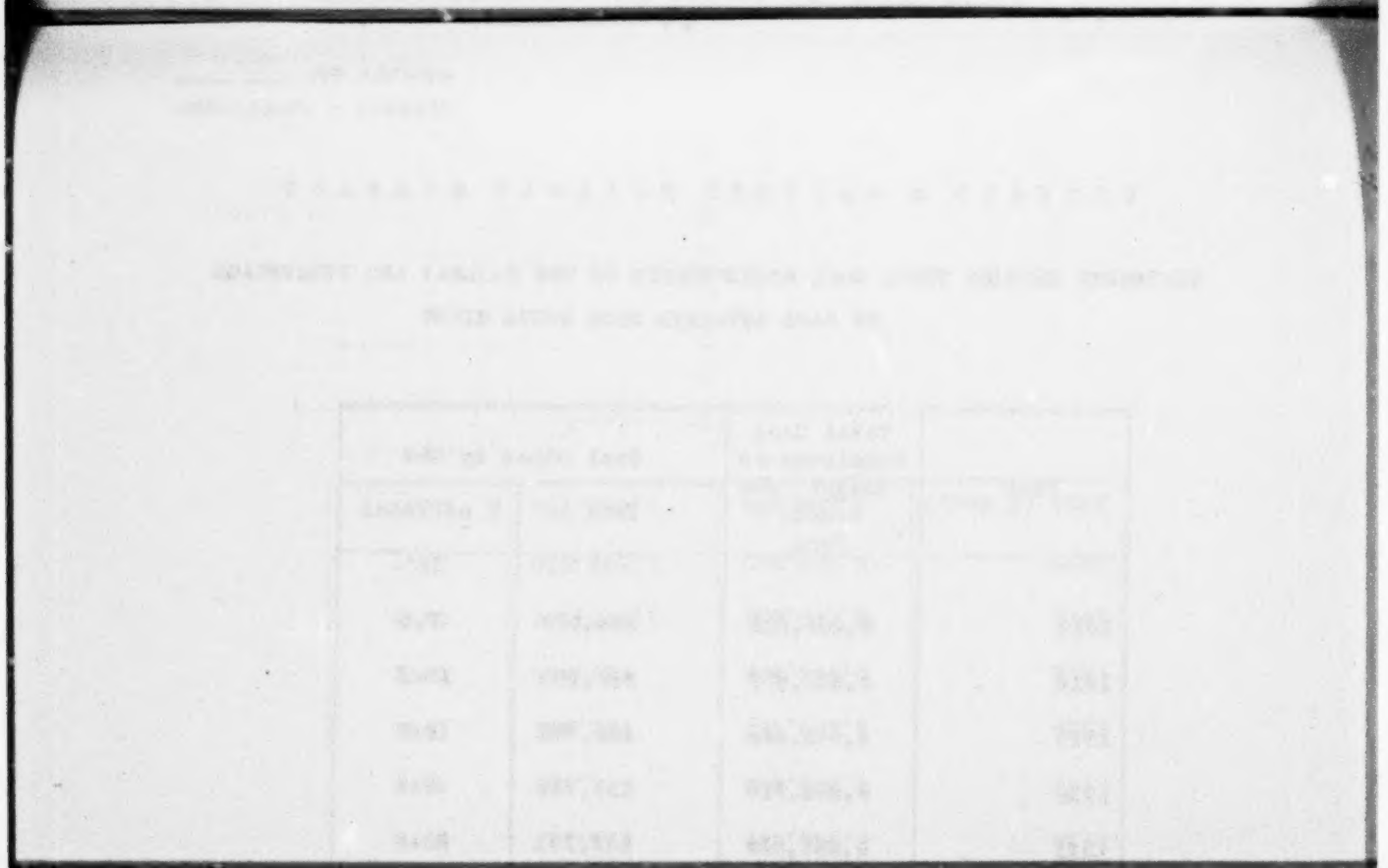
STATEMENT SHOWING TOTAL COAL REQUIREMENTS OF N&W RAILWAY AND PERCENTAGE OF SAME OBTAINED FROM OWNED MINES

Year	Total Coal Requirements (Bought and Mined) Tons	Coal mined by N&W	
		Tons	% of Total
1917	3,406,822	254,579	7.5
1918	3,651,379	382,659	10.5
1919	2,942,464	455,956	15.5
1920	3,266,718	211,731	6.5
1921	2,659,658	547,791	20.6
1922	3,082,636	672,117	21.8
1923	3,535,882	874,723	24.7
1924	3,221,167	932,266	29.0
1925	3,184,803	927,514	29.1
1926	3,569,266	1,045,087	29.3
1927	3,288,313	1,108,970	33.7
1928 (9 Mos.)	2,308,490	1,062,700	46.1

For ident.

Interstate Commerce Commission.
Docket No. — (date) 19--
Complainant's
Protestant's
Intervener's
Defendant's
Respondent's
Applicant's
Commission's
Exhibit No. 6.
Witness Dunglinson
Reporter Lowe.
Dec. 27/28.

50A



This Exhibit shows the total coal requirements of the Norfolk & Western Railway Company by years commencing 1917, the fuel coal produced at its mines by years and the percentage of total fuel requirements produced at its mines. The figure shown as total fuel requirements for the year 1917 is for the whole calendar year, while the tonnage produced at its mines is for that part of the year subsequent to April 19, the date of the purchase of the first unit. The productions at its mines increased from 254,579 tons in the part year 1917 to 1,108,970 tons in the year 1927 and 1,062,700 tons for the first nine months of 1928. The percentage of total requirements mined by the company has increased from 7.5% in 1917 to 48% in 1928. The relatively small production and percentage in 1920 was the result of general suspension of mining in the Thacker and Kenova Districts due to labor trouble.

[fol. 65] The estimated tonnage of coal in the ground at the time of purchase at the Howard Collieries was 8,650,000 tons free of royalty, which does not include an estimated tonnage in one or more seams in which it is confidently expected there are extensive areas of mineable coal. The estimated tonnage in leases subsequently acquired is 12,000,000 tons making a total estimated tonnage at the Howard Collieries of 30,650,000 tons. Of the total estimated tonnage of the Howard Collieries 4,645,062 tons have been produced from the date of acquisition by the railway company to September 30, 1928, leaving an estimated tonnage in the ground of 26,004,938 tons.

The estimated tonnage in the Vulcan property at the time of purchase was 4,135,000 tons (this figure was corrected by witness to read 4,253,000 tons (transcript p. 113) and in additional leases subsequently acquired 800,000 tons, making a total estimated tonnage in the Vulcan properties of 4,953,000 tons. Since the acquisition by the railway company 1,746,779 tons have been produced, leaving an estimated tonnage of 3,206,221 tons, as of September 30, 1928.

At the Pond Creek Colliery the estimated tonnage at the time of purchase was 7,500,000 tons with an estimated 10,000,000 tons in additional leases subsequently acquired, making a total of 17,500,000 tons. The production since the acquisition by the railway company has been 2,024,217 (corrected by witness to read 2,084,217) tons to September

[fol. 66] 20, 1928, leaving an estimated tonnage of 15,415,783 tons in the ground as of that date. The total estimated tonnage in the entire mining properties at the time of purchase was 30,303,000 tons, the estimated tonnage in leases subsequently acquired was 22,800,000 tons; 8,476,058 tons have been mined since acquisition leaving as of September 30, 1928, 44,626,942 tons.

The plants and improvements, such as tipples, conveyors and operating structures and all equipment are modern and adequate and in good physical condition as indicated by recent production. The cost of production should be continued at a reasonable figure and compare favorably with that obtaining at commercial mines. The properties have been well maintained and developed, as is shown by the annual tons per thousand dollars of plant investment which has increased from 180 in 1918, the first full year of railroad operation, to 399 in 1927. In 1928 the annual production per thousand dollars of investment will exceed 500 tons.

I consider the mining properties of the Norfolk & Western Railway Company a valuable part of its transportation facilities.

The cross-examination of this witness was reserved until a later time.

R. W. Booth was called as a witness on behalf of the Norfolk & Western Railway Company and, being duly sworn, testified as follows:

I am the Secretary and Assistant Treasurer of the Norfolk & Western Railway Company and as such I have the custody of the title papers of the company including the [fol. 67] title papers to the fuel coal properties owned and operated by it. The fuel properties are divided into three groups, the title papers to which are separate.

Here was offered and admitted in evidence Exhibits 7 to 13, both inclusive, being the title papers to the Howard Collieries; Exhibits 14 to 16, both inclusive, being the title papers to the Vulcan Colliery; Exhibits 17 and 18 being the title papers to the Pond Creek Colliery.

(Exhibits 7 to 18, both inclusive, omitted from printing by stipulation of counsel.)

The witness testified further that he had custody and control of the resolutions of the carrier relating to the acquisition of the coal properties and offered eight sheets of such resolutions which were received in evidence marked: "Carrier's Exhibit No. 19".

[fol. 68] EXHIBIT No. 19

It is hereby certified, that the following is a true and correct excerpt from the minutes of a stated meeting of the Board of Directors of the Norfolk and Western Railway Company held in the City of Philadelphia, Pa., on February 28th, 1917, at which meeting more than a quorum of the Board was in attendance.

The President submitted to the Board a statement, showing that at the prices named by the coal operators for the supplies of fuel coal needed by the Company the cost of coal to the Company for the year 1917 figured on the consumption in the year 1916 would exceed the cost of fuel coal used in 1916 by more than $5,000,000 and stated that in his judgment it would be for the best interests of the Company to purchase going coal operations sufficient to supply the fuel coal needed by the Company, which it was estimated could be obtained in this way at an outside cost to the Company of approximately $1.27 per gross ton against the price named by the operators of $2.75 per net ton, equivalent to $3.08 per gross ton. Whereupon, on motion, it was unanimously—

Resolved, That the President be and he is hereby authorized to purchase going coal operations to an amount sufficient in his judgment to produce the fuel required for the operations of the Company, such purchases to be made upon best obtainable terms.

Attest: I. W. Booth, Secretary. (Seal).

[fol. 69] It is hereby certified, That the following is a true and correct excerpt from the minutes of a stated meeting of the Board of Directors of the Norfolk and Western Railway Company held in the City of Philadelphia, Pa., on March 16, 1917, at which meeting more than a quorum of the Board was in attendance.

The President reported that he had secured contracts for a period of two years at the rate of $2.00 per net ton for

about 85,000 tons of fuel coal a month. He had also exercised options on two going mines, and would close these if the titles proved good. Under normal operating conditions the output of these mines would be about 400,000 tons a year, and might possibly be increased to 500,000 tons. The coal from these mines, with that to be furnished under the contracts referred to, would supply about one-half the fuel coal needed by the Company, and he was in hopes that he would be able to secure further contracts. He also referred to a proposition which had just been made for the sale of a very large operation, covering an option on the property to be taken up at the expiration of three years, coal to be furnished during the period at a gradually reduced price, and all profits shown for the period being applied at the end of the period on the purchase price. The property comprises about 11,000 acres, and the price would be in the vicinity of $2,500,000. The proposition, however, was not as yet in sufficiently definite shape for action.

Attest: I. W. Booth, Secretary. (Seal).

[fol. 70] It is hereby certified, That the following is a true and correct excerpt from the minutes of a stated meeting of the Board of Directors of the Norfolk and Western Railway Company held in the City of Philadelphia, Pa., on June 27th, 1917, at which meeting more than a quorum of the Board was in attendance.

The following report of the President with reference to acquisition of leasehold interests in fuel coal properties was read:

To the Board of Directors:

As the result of recent advances in the price of fuel coal to this Company, the Board has adopted the policy of the acquisition of leasehold interests in coal mining properties in order that the company may mine and furnish to itself a substantial portion of its fuel coal. Pursuant to this policy, the management has been able to acquire leasehold interests in the several coal operations scheduled below. Negotiations have been in progress for the purchase of leasehold interests in other going concerns, but by reason of the great profit earned at present prices, no final agreement could be reached which was satisfactory to the owners and the representatives of the Railway Company.

The Railway Company has acquired, however, and is now operating under its leasehold interests:

(a) The group of mines commonly known as the Howard operations, for which it has paid the sum of $1,500,000.00;

(b) The Vulcan operation for which it agreed to pay the sum of $420,000.00. Of this amount $400,000.00 has been paid and the residue, to-wit: $20,000.00, is retained by the Railway Company pending litigation concerning the title to a small portion of the boundary.

[fol. 71] Character of Title Acquired

Our General Counsel has advised the management that it was inexpedient, under the laws of West Virginia, for the Railway Company to attempt to acquire the fee simple title to the lands involved in these transactions, but that it is compeent for the Railway Company to hold title by a leasehold interest for coal which it is proposed shall be mined for the fuel uses of the Railway Company, and hence all of the transactions have resulted in acquisition by the Railway Company of all the property of the companies from which purchases have been made except the fee simple title to the land containing the coal, and the title to the coal has been acquired either under lease from the companies or by the assumption of the leases already existing.

Royalties: As far as the Howard operations are concerned, the Railway Company has, by its payments to the several companies holding title, paid off and discharged, by anticipation, all of the royalties that can or will become due, and hence we are mining these operations free of any further assessments on account of royalties. This applies to all of this group except the Harris lease of some 190 acres, but I am glad to report that, since the closing out of the transactions for the Howard operations, the Railway Company has been able to arrange to acquire by leasehold coal upon the Harris land at the price of $15,000.00, which involves the payment by anticipation of the royalties to accrue as the result of mining the coal from these premises. The title to this land now rests in Mr. F. L. Schoow, who was the active representative of the companies involved in the transactions concerning the Howard operations and the title will be promptly transferred in such form and to whom

as the Railway Company, under the advice of counsel, may direct.

The Vulcan operations are represented almost entirely by leases and payment of royalties will accrue thereunder from time to time as the coal is mined therefrom at 6¢ and [fol. 72] 7¢ per ton, except as to seam No. 3 on the Harry C. Nash, Tr., lease which is at the rate of 10¢.

Howard Operations

These operations embrace some 3,000 acres of coal with a number of workable seams which increase largely the coal area. The titles were vested in four companies, to-wit:

Two land companies, the Buffalo Land & Coal Company and the Howard Land Company, these companies being the holders of the title to the lands in question or the holders of coal leases already placed upon the lands; and

Two operating companies, the Howard Colliery Company and the Howard Junior Coal Company, which two companies owned the coal mining plants and were engaged in operating the properties under the leases.

There are three mining plants in operation on these properties; the Howard Operation, Frederick Mine, and Howard Junior Operation.

Vulcan Operations

These operations consist of a number of coal leases aggregating about 800 acres out of which mining operations have been carried on for some years and the coal area reduced, but as there are other workable seams the actual coal area is much greater than the acreage.

Fee-simple Title

The fee simple title to the lands which are the subject of the leases hereinabove described has been, or will be, vested in the Pocahontas Coal and Coke Company. This was accomplished after conference with the Board of Directors of that company.

Prior to the acquisition of these operations your management caused expert examination to be made of the several plants, mines and coal areas and reports are on file for the inspection of the Board if deemed desirable, concerning the

[fol. 73] character and condition of the plants and properties. These reports were such as to satisfy the management that the properties in question could be operated by the Railway Company and fuel coal secured at a cost that would contribute greatly to the reduction of the average cost of its fuel supply.

I am glad also to report that these transactions with the several companies have been carried through as the result of the unanimous vote of the stockholders of the several companies.

I submit to the Board copies of the various deeds, contracts, leases, etc., which represent in detail the transactions which are the subject matter of this report.

Respectfully submitted,

L. E. Johnson, President.

Whereupon, on motion, the following preamble and resolution were adopted:

Whereas the President of this Company has this day filed a report in writing setting forth in detail the terms and conditions under which leasehold interests in certain coal mining operations have been acquired by the Railway Company for the purpose of providing fuel coal for its uses, which report shows the acquisition of what is commonly known as the Howard operations at the sum of $1,000,500.00; and also the acquisition of the Harris land in which this Company is to have a leasehold interest, (the lease now upon which is a part of the Howard properties) for the sum of $15,000.00; and also the leasehold interests of the Vulcan Coal Company at the sum of $420,000.00 subject to the retention of $20,000.00 of the purchase money as shown by said report:

And whereas it also appears that the management has taken possession of the several mining operations located upon said premises and is now engaged in operating the same for the purpose of procuring for the Railway Company fuel coal.

[fol. 74] Now therefore, it is resolved that the action of the President, in acquiring the leasehold interests in said properties and causing the same to be operated for and on behalf of the Railway Company, be and the same is hereby ratified and confirmed.

Attest: I. M. Booth, Secretary. (Seal.)

[fol. 74½] The first action taken by the Board of Directors of the Carrier was on February 28, 1917 and is shown by page 1 of Exhibit 19. At that meeting the President submitted to the Board a statement showing that the cost of fuel coal to the Norfolk & Western Railway Company for the year 1917, at prices named by the coal operators, would be about $5,000,000.00 more than it was for the preceding year, 1916, and suggested the purchase of outside coal properties which would furnish a coal supply to the Railway Company at a cost of approximately $1.27 per gross ton, as compared with $2.75 per net ton, equivalent to $3.08 per gross ton, after which a resolution was adopted authorizing the President to purchase going coal operations in order to secure that economy.

Page 2 of Exhibit 19 is a report by the President to the Board of Directors at a meeting held March 16, 1917, to the effect that he had secured coal contracts at $2.00 per [fol. 75] net ton for about 85,000 tons of fuel coal a month, and that he had exercised options on two going mines.

The President also reported an option on a property of about 11,000 acres, which could be purchased for approximately $2,500,000.00, stating that this proposition was not yet in sufficiently definite shape for action.

Sheets 3, 4, 5, 6 and 7 refer to a report from the President of the company to the Board of Directors at its meeting held June 27, 1917, at which time the Pres-dent reported, in quite some detail, the action taken by the company in the acquisition of two coal properties; (a) The group of mines commonly known as the Howard operations, for which the company paid $1,500,000.00; (b) the Vulcan operation, for which the company agrees to pay the sum of $420,000.00. This report continues to explain the character of title acquired, the composition of the Howard operations, the Vulcan operations and the conveyance of the fee simple title.

That is followed by a preamble summarizing the report of the President, and a resolution approving the action of the President in acquiring the leasehold interests in said Howard and Vulcan operations.

Sheet 8 of Exhibit No. 19 covers a statement by the Chairman to the Board of Directors, submitting a form of deed of assignment and sale of the leases and other properties of the Pond Creek By-Products Coal Company to

the Norfolk & Western Railway Company, followed by a resolution in which the company accepts from the Pond Creek By-Products Coal Company an assignment of the leases and a conveyance of the other property as set out in the deed of assignment and sale, which is submitted in addition to Sheet 8.

[fol. 76] The meeting at which the resolutions to accept from the Pond Creek By-Products Company an assignment of the leases and the conveyance of the other property was held October 27, 1920.

I am the custodian of the contract between the Director General of Railroads and the Norfolk & Western Railway Company under which contract the Federal Government took over the railroads during the war.

This contract was offered and admitted in evidence as Carrier's Exhibit No. 20.

[fols. 77 & 78] EXHIBIT No. 20

INTERSTATE COMMERCE COMMISSION

Dec. 17/28.

Witness: Booth.

Agreement Between the Director General of Railroads and Norfolk and Western Railway Company and Other Corporations

December 27, 1918

[fol. 79] Contents

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[fol. 80] Preamble and Recitals

This agreement, made this 27th day of December, 1918, between William G. McAdoo, Director General of Railroads, hereinafter called the Director General, acting on behalf of the United States and the President, under the powers conferred by the proclamations of the President hereinafter referred to, party of the first part, and the Norfolk and Western Railway Company, the Virginia-Carolina Railway Company, the New River, Holston and Western Railroad Company, all of said companies being corporations duly organized under the laws of the State of Virginia; the Williamson and Pond Creek Railroad Company and the Tug River and Kentucky Railroad Company, the two latter being corporations duly organized under the laws of the State of Kentucky, parties of the second part:

Witnesseth that—

(a) Whereas by a proclamation dated December 26, 1917, the President, acting under the powers conferred on him by the Constitution and laws of the United States, by the joint resolutions of the Senate and House of Representatives bearing date April 6 and December 7, 1917, respectively, and particularly under the powers conferred by section 1 of the act of Congress approved August 29, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," took possession and assumed control at 12 o'clock noon on December 28, 1917, of certain railroads and systems of transportation, including the railroads and transportation systems of the Companies and the appurtenances thereof, and directed that the possession, control, operation, and utilization of the transportation systems thus taken should be exercised by and through William G. McAdoo, appointed Director General of Railroads; and

(b) Whereas the Congress of the United States, by an act approved March 21, 1918, hereinafter called the Federal control act, has authorized the President to enter into agreements with the companies owning the railroads and systems thus taken over for the maintenance and upkeep of the same during the period of Federal control, for the

determination of the rights and obligations of the parties to the agreement arising from or out of Federal control including the compensation to be received or guaranteed, and for other purposes, as in said act more fully set out, and authorized the President to exercise any of the powers by said act or theretofore granted him with relation to Federal control through such agencies as he might determine; and

[fol. 81] (c) Whereas by a proclamation dated March 29, 1918, the President, acting under the Federal control act and all other powers him thereto enabling, authorized the Director General either personally or through such divisions, agencies, or persons as he may appoint, and in his own name or in the name of such divisions, agencies, or persons, or in the name of the President, to agree with the carriers, or any of them, or with any other person in interest, upon the amount of compensation to be paid pursuant to law, and to sign, seal, and deliver in his own name or in the name of the President or in the name of the United States such agreements as may be necessary and expedient with the several carriers or other persons in interest respecting compensation, or any other matter concerning which it may be necessary or expedient to deal, and to make any and all contracts, agreements, or obligations necessary or expedient and to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular the acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject thereof, the President is authorized to do and perform; and

(d) Whereas the Interstate Commerce Commission has certified to the President the amount of the average annual railway operating incomes of the said Companies, computed in the manner provided in section 1 of the Federal control act, and the aggregate of which amounts is Twenty million six hundred and forty thousand, eight hundred and ninety-nine dollars and ninety-eight cents ($20,640,899.98), subject to such changes and corrections as the Commission

may hereafter determine and certify to be requisite in order that the accounts and reports of the Companies used by the Commission as the basis of computing said average annual railway operating incomes may be brought into conformity with the accounting rules or regulations of the Commission in force at the time of such accounting, or in order to correct computations based on such accounts or reports; and

(e) Whereas, The Norfolk and Western Railway Company, on the 19th day of April, 1917, acquired as a source of fuel supply for its own operating purposes, a lease of a coal property situated near Chattaroy, Mingo County, in the State of West Virginia, designated as Howard Collieries, and on June 1, 1917, acquired, as another source of such fuel supply, a lease of a coal property, situated at Vulcan, partly in Mingo County in the State of West Virginia, and partly in Pike County, in the State of Kentucky, and in developing these coal properties made, up to December 31, 1917, a capital investment of One Million Nine Hundred and Ninety-Nine thousand, Five Hundred and Seventy Dollars and Ninety Cents ($1,999,570.90), in the plant of the mining properties without including therein the capital investment in material and stores or in open account of the mining operation, and it has been agreed that such leasehold interest of the Norfolk and Western Railway Company in the said two coal properties shall be considered as included in the description of properties taken over by the President, as set out in paragraph (a) of Section 2 of this agreement; to be operated by the Director General as a part of said property so taken over, and, inasmuch as the results of the operation of said coal properties were reflected in the standard return only for the short periods hereinbefore indicated, it has been further agreed that the Director General shall pay to the Company therefor a compensation as set out in paragraph (f) of Section 7 hereof, which shall be in addition to the compensation as set out in paragraph (a) of said Section 7, and that such capital expenditures in connection with said leased properties, subsequent to December 31, 1917, shall bear interest under paragraph (d) of Section 7 of this agreement.

Now, therefore, the parties hereto, of the first and second parts, respectively, each in consideration of the agree-

ments of the other herein contained, do hereby covenant and agree to and with each other as follows:

[fol. 82] Section 1.—Privity, Alterations, Definitions, etc.

Sec. 1 (a) This agreement shall be binding upon the United States, the Director General and his successors, and upon the Companies, and their respective successors and assigns.

Wherever in this agreement the word "Company" is used, it shall be understood as meaning the Norfolk and Western Railway Company; the words "Affiliated Companies" shall be understood as meaning the four other corporations, parties to this agreement; and the word "Companies" shall be understood as meaning the five corporations, parties to this agreement.

The rights and obligations of the Companies in this agreement contained are several, not joint. The Company owns all the stock, except directors' qualifying shares, of all the Affiliated Companies.

This agreement shall not be construed as creating any right, claim, privilege, or benefit against any party hereto in favor of any state or any subdivision thereof, or of any individual or corporation other than the parties hereto.

(b) The provisions of this agreement may be altered, amended, or added to by and only by mutual consent signified by instruments in writing signed by the Director General and by some officer of the Company thereto duly authorized by the Board of Directors of the Company.

(c) Wherever in this agreement the word "Commission" is used it shall be understood as meaning the Interstate Commerce Commission, acting by divisions or otherwise as authorized by law; but any party shall have the right to have the decision of any division reviewed by the Commission sitting as a whole.

(d) Wherever in this agreement the words "Federal control" are used to indicate a period of time, they shall be understood as meaning the period from 12 o'clock midnight of December 31, 1917, to and including the day and hour on which said control shall cease.

(e) Wherever in this agreement the words "test period" are used, they shall be understood as meaning the period between July 1, 1914, and June 30, 1917, both inclusive.

(f) Wherever in this agreement the words "standard return" are used, they shall be understood as meaning average annual railway operating income, computed in the manner provided in section 1 of the Federal control act, and ascertained and certified by the Commission.

(g) Wherever in this agreement the words "Director General" are used, they shall be undestood as designating William G. McAdoo, or such other person as the President may from time to time appoint to exercise the powers conferred on him by law with relation to Federal control, or such agents or agencies as the Director General may from time to time appoint for the purpose; and wherever by this agreement any notice is to be given by the Director General, the same may be given in his name by any subordinate thereto duly authorized.

(h) Wherever the property of any of the Companies is referred to in this agreement it shall be understood as including all the property described in paragraph (a) of section 2 hereof, whether owned by or leased to the Companies, and, where the context permits, all additions or betterments thereto or extensions thereof made during Federal control; and as to all such leased property the Companies shall have the benefit of and be subject to all the obligations and provisions of this agreement and shall be subject to all duties imposed by law in respect of such leased property.

(i) The descriptive words at the heads of the several sections of this agreement and the table of contents are inserted for convenience merely, and are not to be used in the construction of the agreement.

[fol. 83] Section 2.—Property Taken Over

Sec. 2. The railroads and systems of transportation of the Company and of its said Affiliated Companies of which the President has taken over possession, use, control, and operation shall be considered as including:

(a) The following roads and properties:

(1) The railroad of the Company located in the States of Virginia, West Virginia, Kentucky, Ohio, North Carolina and Maryland, its principal termini in Virginia being Nor-

folk, Roanoke, Bristol and Norton; in West Virginia, Bluefield and Kenova; in Ohio, Portsmouth, Cincinnati and Columbus; in North Carolina, Durham and Winston-Salem; and in Maryland, Hagerstown;

(2) The railroad of the Virginia-Carolina Railway Company, extending from a Junction with the Norfolk and Western Railway, at Abingdon, Virginia, to Grassy Ridge, Virginia; from Damascus, Virginia, to the Virginia-Tennessee state line, on Beaver Dam Creek; and from Creek Junction, Virginia, to Elkland, North Carolina;

(3) The railroad of the New River, Holston and Western Railroad Company, extending from a junction with the Norfolk and Western Railway at Narrows, Virginia, to Suiter, Virginia;

(4) The railroad of the Williamson and Pond Creek Railroad Company, extending from a junction with the Norfolk and Western Railway at or near Williamson, in Mingo County, West Virginia, into or through the County of Pike, Kentucky, at the mouth of Pond Creek; thence up Pond Creek to McVeigh, Kentucky;

(5) The railroad of the Tug River and Kentucky Railroad Company, not yet fully constructed, one of its completed sections extending from a junction with the Norfolk and Western Railway, in Mingo County, West Virginia, thence across the Tug Fork of the Big Sandy River, into Pike County, Kentucky, a distance of about 1.37 miles; another of its completed sections extending from a junction with the Norfolk and Western Railway, in Mingo County, West Virginia, thence across the Tug Fork of the Big Sandy River, near the mouth of Peters Creek, thence into Pike County, Kentucky, a distance of about 1.55 miles; and the third of which completed sections extending from a junction with the Norfolk and Western Railway in Mingo County, West Virginia, to the West Virginia-Kentucky state line, crossing the Tug Fork of the Big Sandy River at the mouth of Poplar Creek, thence up Poplar Creek, Pike County, Kentucky, to a point about 1.84 miles from the West Virginia-Kentucky state line, a total length of about 1.93 miles; the total mileage of the completed sections (parts of which are sometimes called branches) being about 4.85 miles;

[fol. 84] together with all branches and tracks, trackage, bridge, and terminal rights, and lines of railroad owned by or leased to and operated by any of the Companies as a part of their systems of transportation, and all other property of the Companies, with the appurtenances thereof, whether included in the foregoing list or not, the revenues of which were used, or which, if the property had been then owned by or leased to the Companies and had then been revenue bearing, would have been used, in computing the standard return of any of the Companies.

Each of the Companies reserves to itself the benefit of all leases (and of all rents and revenues accruing therefrom) of parts of its right of way, station grounds, and other property, the revenues from which under the accounting rules of the Commission in force during the test period were properly creditable to "miscellaneous rent income" or "miscellaneous income." Each of the Companies grants to the Director General all its rights to terminate leases of any part of its right of way, yards, or station grounds, and to occupy and use the premises of any such lessee when, in his judgment, the same is required for operating purposes. Each of the Companies shall have for its own benefit the right to lease for industrial sites or other purposes such portion of its right of way, yards, or station grounds, or structures thereon as are not required by the Director General for operating purposes, and to receive and enjoy the rentals therefrom, subject to the right of the Director General to cancel any such lease and to occupy the premises or structures whenever, in his judgment, the same are necessary for operating purposes. All expenses connected with any such property heretofore or hereafter leased or otherwise occupied, as in this paragraph provided, including taxes thereon which during the test period were not charged to railway tax accruals, shall be paid by the Companies while receiving the revenues therefrom.

The Company also specifically reserves to itself the following property, namely, two piers and slips at Lamberts Point, Virginia, together with all the land lying south of the drainage canal, having an area of approximately 66 acres, together with the Company's warehouses and buildings thereon and appurtenances thereto, and also an additional tract of land lying south of Lambert Creek, about

800 feet wide, containing approximately 40 acres, adjoining the first tract above described in this reservation; the first of said tracts having been leased by the Norfolk and Western Railway Company to the United States of America on the 19th day of July, 1917, (which said lease was renewed on the 1st day of July, 1918), and the second of which tracts so reserved is subject to a certain option of the United States to acquire from the Company a lease thereof.

(b) All materials and supplies on hand at midnight December 31, 1917.

(c) All balances in the account or accounts representing the total of "Net balance receivable from agents and conductors" as of midnight December 31, 1917.

(d) The sum of seventy-seven thousand eight hundred and twenty-four dollars and four cents ($77,824.04) being the amount as of December 31, 1917, of the Norfolk and Western Railway Company Relief Fund.

[fol. 85] Section 3.—Acceptance

Sec. 3. (a) The Companies accept all the terms and conditions of the Federal control act and any regulation or order made by or through the President under authority of said act or of that portion of the act approved August 29, 1916, referred to in paragraph (a) of the preamble to this agreement which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation; and they further and expressly accept the covenants and obligations of the Director General in this agreement set out and the rights arising thereunder in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights, at law or in equity, which they or any of them now have or hereafter can have, otherwise than under this agreement, against the United States, the President, the Director General, or any agent or agency thereof, for compensation under the Constitution and laws of the United States for the taking possession of their property, and for the use, control, and operation thereof during Federal control, and for any and all loss and damage to their business or traffic by reason of the diversion thereof or otherwise which has been or may be caused by said taking or by said possession, use, control, and operation.

No claim is made by the Companies for compensation for the period between noon of December 28 and midnight of December 31, 1917; and the revenues of said period shall belong to the Companies, and the expenses thereof shall be paid by them, allocated in both cases as provided in paragraph (b) of section 4 hereof.

(b) The Companies, on their own initiative or upon the request of the Director General, shall take all appropriate and necessary corporate action to carry out the obligations assumed by them in this agreement or lawfully imposed upon them by or pursuant to the proclamation of December 26, 1917, or by the Federal control act.

(c) The Federal control act being in section 16 thereof expressly declared to be emergency legislation enacted to meet conditions growing out of war, nothing in this agreement shall be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of the Companies, or the method or basis of the capitalization thereof, and the recitals or provisions of this agreement shall not be used, as evidence or otherwise, by or against any party hereto in any pending or future proceeding which involves the acquisition or valuation of the property of any of the Companies or any part thereof; but nothing in this paragraph shall be taken or construed as affecting the settlement and discharge contained in paragraph (a) of this section, nor as limiting or qualifying any of the provisions of said paragraph for the purposes thereof, nor as limiting the use of this agreement as evidence in any proceeding under this agreement or under the Federal control act.

[fol. 86] Section 4.—Operation and Accounting During Federal Control

Sec. 4. (a) All amounts received by the Director General under paragraphs (c) and (d) of Section 2 hereof and all other amounts whether received from the Companies in cash or collected or realized upon by him from current operating assets belonging to the Companies or arising from railway operations prior to midnight of December 31, 1917, shall be credited by him to the Companies; and the Director General shall, to the extent of the cash so received or realized, pay and charge to the Companies all expenses aris-

ing out of railway operations prior to January 1, 1918, including reparation claims, and, unless objected to by the Company, may pay and charge to the Companies any of such expenses, including reparation claims, in excess of the cash so received or realized. Balances of the above accounts shall be struck quarterly on the last days of March, June, September, and December of each year, and the cash balance found on such adjustments to be due either party shall be then payable and, if not paid, shall bear interest at the rate of 6 per cent per annum, unless the parties shall agree upon a different rate; except that the rate of interest on any portion of a balance found due to the Companies which is derived from cash in bank to the credit of the Companies on interest, shall be adjusted in each case independently of this contract as the parties may agree.

(b) Railway operating expenses, reparation and other claims, hire of equipment and joint facility rents shall be allocated with reference to the time when incurred as between the period prior and subsequent to midnight of December 31, 1917, and as between the period of Federal control and the period subsequent thereto. Railway operating revenues shall be allocated as between the period prior and subsequent to midnight of December 31, 1917, in accordance with the esstablished accrual practices of the Companies; except that where prior to midnight of December 31, 1917, the Companies' part of a service on through business had been completed or carload lots on their own lines had reached destination, the revenue of the Companies for such service shall be allocated to them; but as to classes of traffic where in the opinion of the Director General such allocation will involve undue delay or undue absorption of accounting labor, such revenues shall be allocated in accordance with the established accrual practices of the Companies. Like methods of accruing and allocating such revenues shall be made at the end of Federal control.

(c) All expenditures made by the Director General during Federal control for additions and betterments, exclusive of equipment, or for extensions begun prior to January 1, 1918, shall be charged to the Companies, and if the completion of any such addition, betterment, or extension is approved or ordered by the Director General, the Company shall be entitled under the provisions of paragraph (d) of

section 7 hereof to interest on the cost thereof from the completion of the work; but no interest (except to the extent that the same may be allowed and included in the compensation provided for in paragraph (a) of section 7 hereof) shall be due the Company upon any such expenditures for work done prior to January 1, 1918. Payments for all equipment ordered or under construction by any of the Companies prior to January 1, 1918, but delivered on or after that date, shall also be considered as expenditures made by order or approval of the Director General under paragraph (d) of section 7 hereof. Interest during construction payable under this paragraph, and also interest during construction on the cost of any additions, betterments, and road extensions made by the Companies or at their expense to the Companies' property during Federal control, shall be included in the cost of the work.

(d) Cash receipts or disbursements and other items arising out of transactions which do not enter into or form a part of those used in determining the Companies' standard return shall not be received or paid by the Director General unless such transactions are negotiated or conducted by his order for account of the Companies and with the consent of the Company. When moneys are so received or paid by the Director General in connection with such corporate transactions they shall be credited or charged to the Companies. [fol. 87] There shall be an accounting of the amounts due by or to any of the parties under this paragraph at the end of each quarter year of Federal control, and the amount so found due shall be then payable and if not paid shall bear interest as provided in paragraph (a) of this section.

(e) Any funds taken over as provided in paragraph (d) of section 2 hereof shall be maintained by payments and charges to appropriate operating expense accounts and used by the Director General during Federal control substantially in the same manner as prior to January 1, 1918.

All sums paid by the Director General to maintain pension funds or pension obligations or practices, and all contributions to Young Men's Christian Associations of employees, employees' savings funds, relief funds or associations, reading rooms, or health, accident, or death benefits for employees, shall be treated as a part of railway operating expenses during Federal control.

panies during Federal control for purposes which relate to the existence and maintenance of the corporations, or to the properties of the Companies not taken over by the President, or to negotiations, contracts, valuations, or any business controversy with the Government or any branch thereof, and which are not specially authorized by the Director General, shall be borne by the Companies; except that the expenses of valuation now being made by the Commission to the extent that they are, in the opinion of the Director General, necessary to comply with the valuation orders and other requirements of the Commission and to the cooperation of the Companies in the making of such valuation, shall be paid by the Director General as a part of railway operating expenses. If the Company is dissatisfied with the ruling of the Director General it may appeal to the Commission, whose decision shall be final.

(g) The Director General shall furnish for additions, betterments and road extensions to the Companies' property approved or ordered by him any of the materials and supplies taken over under paragraph (b) of section 2 hereof, or purchased by him and held for use in connection with the Companies' property, in so far as, in his judgment, he can do so with due regard to his own requirements. Materials and supplies so furnished shall be charged to the Companies at cost.

(h) The Director General shall at his option be substituted for the period of Federal control in the place of the Companies in respect of the benefits and obligations of contracts relating to operation in force January 1, 1918 (including contracts made by subsidiaries for the use and benefit of the Companies and the right to abrogate or change and make new contracts with express companies for the period of Federal control), except as to contracts between the Companies and subsidiary companies which shall be considered and treated as arrangements or practices; and the Director General shall in like manner at his option be substituted for such period in respect of the benefits and obligations of arrangements and practices in force during the test period in regard to fuel, materials, and supplies for the operation of the property described in paragraph (a) of section 2 hereof and of any additions, betterments, and road

extensions thereto, obtained from any mine, oil field, or other source of supply owned or controlled by the Companies, it being understood that under such arrangements or practices, if availed of by the Director General, he shall, to the extent necessary to offset any increase in the standard return growing out of the furnishing by the Companies or their subsidiaries, during the test period, of fuel, materials, and supplies under an arrangement or practice at less than the then cost or the then market value thereof for railroad purposes, be charged for such fuel, materials, and supplies a price expressed in dollars or cents per unit below or above the then cost or the then market value thereof for railroad purposes (as the practice of the Companies may have been) in the same amount that the prices charged the Companies during the test period were below or above the then cost or the then market value thereof for railroad purposes; and at the request of the Director General or the Companies the prices for fuel or materials supplied between December 31, 1917, and the execution of this contract shall be adjusted on the foregoing basis: Provided, however, That a source of supply which the Companies had acquired to safeguard their own operations shall not be depleted or reduced for use on other transportation systems, except in cases of emergency to be determined by the Director General, in which event the quantity so used on other transportation systems shall be accounted for to the Companies at the fair value thereof: And provided further, That materials and supplies secured under contracts which the Companies had made for their own operations shall, so for as practicable, be used on the Companies' property, and that, if used on any other transportation system, materials and supplies of like character shall be furnished by the Director General for use in making such additions, [fol. 88] betterments, and road extensions as shall be chargeable to the Companies, and shall be charged at cost under such contracts.

(i) The Director General shall pay, or save the Companies harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken over during Federal control, except the expenses which under this agreement are to be borne by the Companies. He shall also pay or save the Companies harmless from all rents called in the monthly reports to the Commis-

sion equipment rents or joint-facility rents, and all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon, the Companies by reason of any cause of action arising out of Federal control, or of anything done or omitted in the possession, operation, use, or control of the Companies' property during Federal control, except judgments or decrees founded on obligations of the Companies to the Director General or the United States.

(j) Except as otherwise provided in this agreement the Director General shall save the Companies harmless from any and all liability, loss, or expense resulting from or incident to any claim made against the Companies growing out of anything done or omitted during Federal control in connection with, or incident to, operation or existing contracts relating to operation; and shall do and perform, so far as is requisite under Federal control for the protection of the Companies, all and singular the things, of which he may have notice, necessary and appropriate to prevent, because of Federal control or of anything done or omitted thereunder, the forfeiture or loss by the Companies of any of their property rights, ordinance rights, or franchises, or of their trackage, lease, terminal, or other contracts involving a facility of operation; but nothing herein contained shall be construed to require the Director General to make any capital expenditure necessary to preserve a franchise or ordinance right not heretofore availed of by the Companies. The Director General shall also save the Companies harmless from any and all claims for breach of covenant heretofore entered into by the Companies or by any predecessor in title or interest in any mortgage or other instrument in respect to insurance against losses by fire.

Nothing in this or in the preceding paragraph shall be construed to be an assumption by the Director General of, or to make him liable on, any obligation of the Companies to pay a debt secured by a mortgage or any rent under a lease, except rents which during the test period were called in the monthly reports to the Commission equipment rents and joint-facility rents and rents which under the accounting rules of the Commission in force during the test period were classified as operating expenses.

The Companies shall, during Federal control, pay the rents of any property, held by them under lease or contract, described in paragraph (a) of section 2 hereof, except the rents which during the test period were, under the rules of the Commission, classified as equipment rents or joint facility rents, and rents which were classified as operating expenses; which excepted rents shall be paid by the Director General. If the lease of, or right to use, any property described in paragraph (a) of said section 2 expires during Federal control, the companies shall, if possible, and if requested by the Director General, renew the same; the rental, however, of property in the excepted classes above mentioned shall be paid by the Director General. The Companies shall pay the same amount of rent as was payable at the beginning of Federal control for other property, the lease of or right to use which is renewed at the request of the Director General, but any increases in the rental of such other property shall be paid by the Director General.

[fol. 89] (k) In carrying out the provisions of paragraphs (a), (b), (c), and (d) of this section and the provisions of section 6 hereof the Director General shall not settle any claim by or against the Companies against the objection in writing of the president or of any other duly authorized officer of the Company. The conduct of all litigation before any court or commission arising out of such disputed claims, or out of operation prior to Federal control, shall be in charge of the Director General's legal force and the expense thereof shall be paid by the Director General; but the Companies may, at their own expense, employ special counsel in connection with any such litigation.

(l) Nothing in this agreement shall be construed as inconsistent with the provision in section 10 of the Federal control act that no process, mesne or final, shall be levied against any property under Federal control, nor as a waiver by the United States of any claim that might otherwise be made by it that the rights of any State or subdivision thereof or of any individual or corporation have been abrogated or suspended by the taking over of the Companies' property or by Federal control.

(m) The Companies shall have the right at all reasonable times to inspect the books and accounts kept by the Director General relating to their property, or to the opera-

tion thereof, and the Director General shall during Federal control furnish the Companies with copies of the operating reports relating to their property, and as soon as practicable after the end of each fiscal year shall furnish to the Companies a complete list of their equipment as of the end of such fiscal year.

[fol. 90] Section 5.—Upkeep

Sec. 5. (a) During the period of Federal control the Director General shall, annually, as nearly as practicable, expend and charge to railway operating expenses, either in payments for labor and material or by payments into funds, such sums for the maintenance, repair, renewal, retirement, and depreciation of the property described in paragraph (a) of section 2 hereof as may be requisite in order that such property may be returned to the Companies at the end of Federal control in substantially as good repair and in substantially as complete equipment as it was on January 1, 1918: Provided, however, That the annual expenditure and charges for such purposes during the period of Federal control on such property and the fair distribution thereof over the same, or the payment into funds of an amount equal in the aggregate (subject to the adjustments provided in paragraph (c) and to the provisions of paragraph (e) of this section) to the average annual expenditure and charges for such purposes included under the accounting rules of the Commission in railway operating expenses during the test period, less the cost of fire insurance included therein, shall be taken as a full compliance with the foregoing covenant.

(b) The Director General may expend such sums, if any, in addition to those expended and charged under paragraph (a) of this section (subject to the adjustments provided in paragraph (c) of this section) as may be requisite for the safe operation of the property described in paragraph (a) of section 2 hereof, assuming a use similar to the use during the test period and not substantially enhancing the cost of maintenance over the normal standard of maintenance of railroads of like character and business during said period; and the amount, if any, of such excess expenditures during Federal control shall be made good by the Companies as provided in paragraph (b) of section 7 hereof.

(c) In comparing the amounts expended and charged under the provisions of paragraphs (a) and (b) of this section with the amounts expended and charged during the test period, due allowance shall be made for any difference that may exist between the cost of labor and materials and between the amount of property taken over and the average for the test period, and, as to paragraph (a), for any difference in use between that of the test period and during Federal control which in the opinion of the Commission is substantial enough to be considered, so that the result shall be, as nearly as practicable, the same relative amount, character, and durability of physical reparation.

(d) At the request of the Director General or the Company there shall be an accounting of the amounts due by or to any of the parties under paragraphs (a) and (b) of this section at the end of each year of Federal control and at the end of Federal control.

(e) If during Federal control any of the property described in paragraph (a) of section 2 hereof or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged otherwise than by fire or public enemies, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss, and the cost of restoration or replacement, or said value or damage, as the case may be, shall be charged to annual railway operating expenses; it being understood that extraordinary losses caused by floods, explosions, train wrecks or accident are included in the matters covered by this paragraph, while ordinary losses due to such causes are included in the matters covered by paragraph (a) of this section: provided, however, That if the Commission on application of the Director General or the Company and after giving due consideration to the practice of the Companies during the test period in respect to such matters and to any other pertinent facts and circumstances, determines that it is just and reasonable that the said cost or value shall be apportioned or extended over a period of more than one year, this shall be done, and so much of said cost or value as may be apportioned by the Commission over the period subsequent to Federal control,

shall be charged to the Companies in the final accounting at the end of Federal control and shall be paid by them.

[fol. 91] If, during Federal control, any of the property described in paragraph (a) of section 2 hereof or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged by fire, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the fire; and the cost of restoration or replacement or said value or damage, as the case may be, shall be charged to annual railway operating expenses, but the same shall not be considered a charge to such expenses for the purposes specified in paragraph (a) of this section.

In case of any such loss or damage by fire, the Director General shall, if given written notice of the requirements of any mortgages, equipment lease, or trust on the property so destroyed or damaged, make such restoration or replacement, or pay such value or damage, in such way as to meet the requirements of such mortgage, equipment lease, or trust in the same manner as would have been proper in applying the proceeds of insurance on such property if it had been insured by the Companies against loss or damage by fire in accordance with the terms of such instruments of lien; and a compliance with the written request of the Company in respect thereof shall be a full acquittance of any obligation of the Director General in the premises.

The foregoing parts of this paragraph are subject to the proviso that in case of loss or damage any additions and betterments made in connection with or as a part of the restoration or replacement of property damaged or destroyed and chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, shall be charged to and paid by the Companies.

The Director General shall not be liable to the Companies for any loss or damage due to the acts of public enemies.

(f) If any additions, betterments, or road extensions are made to the property taken over or any equipment is added at the expense of the Companies and with the approval or by order of the Director General during Federal control, he shall expend and charge to railway operating expenses

such sums either in payments for labor and materials or by payments into funds, as may be requisite for the proper maintenance, repair, renewal, retirement, and depreciation of such property until the end of Federal control.

(g) The Companies shall have the right to inspect their property at all reasonable times during Federal control, and the Director General shall provide reasonable facilities for such inspection.

(h) If any question shall arise, either during or at the end of Federal control, as to whether the covenants or provisions in this section contained are being or have been observed, the matter in dispute shall, on the application of the Director General or the Company, be referred to the Commission, which, after hearing, shall make such findings and order as justice and right may require, which shall be final as to the questions submitted and shall be binding on and observed by the parties hereto, except that the Director General or the Company may take any question of law to the courts, if he or it so desires.

[fol. 92] Section 6.—Taxes

Sec. 6. (a) All taxes assessed under Federal or any other governmental authority for the period prior to January 1, 1918, including a proportionate part of any such tax assessed after December 31, 1917, for a period which includes any part of 1917 or preceding years and unpaid on that date, all taxes commonly called war taxes which have been or may be assessed against the Companies under the act of Congress entitled "An act to provide revenue to defray war expenses, and for other purposes," approved October 3, 1917, or under any act in addition thereto or in amendment thereof, and all taxes which have been or may be assessed on property under construction, and all assessments which have been or may be made for public improvements, chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, shall be paid by the Companies; but upon the amount thus chargeable to investment interest shall be paid to the Company during Federal control at the rate provided in paragraph (d) of section 7 hereof. Taxes assessed during construction on additions,

betterments, and road extensions made by the Companies with the approval or by order of the Director General during Federal control shall be considered a part of the cost of such additions, betterments, and extensions, and shall, under the provisions of paragraph (d) of section 7 hereof, bear interest as a part of such cost from the date of the completion of such additions, betterments, or extensions. Assessments for public improvements which do not become a part of the property taken over shall bear interest from the date of the payment of such assessment.

(b) If any tax or assessment which under this agreement is to be paid by the Companies is not paid by them when due, the same may be paid by the Director General and deducted from the next installment of compensation due under section 7 hereof. If any taxes properly chargeable to the Director General have been or shall be paid by the Companies, they shall be duly reimbursed therefor.

(c) The Director General shall either pay out of revenues derived from railway operation during the period of Federal control or shall save the Companies harmless from all taxes lawfully assessed under Federal or any other governmental authority for any part of said period on the property under such control, or on the right to operate as a carrier, or on the revenues derived from operation, and all other taxes which under the accounting rules of the Commission in force December 31, 1917, are properly chargeable to "railway tax accruals," except the taxes and assessments for which provision is made in paragraph (a) of this section. The Director General shall pay or save the Companies harmless from the expense of all suits respecting the classes of taxes payable by him under this agreement.

(d) If any such tax is for a period which began before January 1, 1918, or continues beyond the period of Federal control, such portion of such tax as may be apportionable to the period of Federal control shall be paid by the Director General, and the remainder shall be paid by the Companies.

(e) Whenever a period for which a tax is assessed can not be definitely determined, so much of such tax as is payable in any calendar year shall be treated as assessed for such year.

[fol. 93] Section 7.—Compensation

Sec. 7. (a) The annual compensation guaranteed to the Companies under section 1 of the Federal control act shall be the sum of Twenty million six hundred and forty thousand eight hundred and ninety-nine dollars and ninety-eight cents ($20,640,899.98) during each year and pro rata for each fractional part of a year of Federal control, subject, however, to any increase or decrease in the standard return hereafter made by the Commission as provided in paragraph (d) of the preamble of this agreement, and to the further increase provided in paragraph (f) of this section.

Compensation paid by the Director General under this agreement, including that provided for in paragraphs (d) and (f) of this section, or arising from any other source shall be paid to the Company; and the Company, after retaining such part thereof as it may be entitled to retain shall distribute the remainder to the parties entitled thereto.

(b) The said compensation shall be paid to the Company quarterly in equal installments on the last days of March, June, September, and December of each year for the quarter ending therewith, except that the first three installments shall be due as of March 31, 1918, June 30, 1918, and September 30, 1918, respectively, but shall be paid upon the execution of this agreement; but from each installment there may be deducted any amount then due by the Companies under paragraphs (a) and (d) of section 4 hereof, under paragraph (b) of section 5 hereof, and under paragraph (b) of section 6 hereof, and all amounts required to reimburse the United States for the cost of additions and betterments made to the property of the Companies not justly chargeable to the United States, unless such matters are financed or otherwise taken care of by the Companies to the satisfaction of the Director General, and the Director General may apportion any such amounts to two or more subsequent installments: Provided, however, That said power to deduct amounts due or accruing under paragraph (b) of section 5 hereof and the cost of additions and betterments not justly chargeable to the United States shall not be so exercised as to prevent the Companies from paying out the sums reasonably required to support their corpo-

rate organizations, to keep up sinking funds for the Companies' debts required by contracts in force December 31, 1917, to pay their taxes, to pay rents and other amounts (not chargeable to capital account) properly payable by the Companies for leased or operated roads and properties to pay interest which has heretofore been regularly paid by the Companies, and interest on loans issued during Federal control and approved by the Director General, nor shall such deduction be made in respect of additions and betterments which are for war purposes and not for the normal development of the Companies, nor in respect of road extensions, nor in respect of amounts due under paragraphs (a) and (d) of section 4 hereof, in cases where the current assets, including materials and supplies, of the Companies taken over by the Director General under the provisions of this agreement clearly exceed the current liabilities of the Companies paid or assumed by the Director General under said section. In the event of a difference as to the fact whether additions and betterments are for war purposes and not for the normal development of the Companies, or as to whether an addition is a road extension, the question may, on application of the Director General or the Company, be referred to and determined by the Commission. [fol. 93½] The power provided in this paragraph to deduct the amount due by the Companies for the cost of additions and betterments not justly chargeable to the United States is further declared to be an emergency power, to be used by the Director General only when he finds that no other reasonable means is provided by the Companies to reimburse the United States and, as contemplated by the President's proclamation and by the Federal control act, it will be the policy of the Director General to so use such power of deduction as not to interrupt unnecessarily the regular payment of dividends as made by the Companies during the test period.

Overdue installments of compensation, or balances thereof, provided for in this section shall bear interest from maturity at the rate of five per cent. per annum, except that if the Director General shall, prior to the execution of this contract, have loaned the Companies any money, the installments of compensation overdue at the date of the exe-

cution hereof shall bear interest from maturity at the same rate as that charged to the Companies on such loans.

(c) During Federal control the Companies shall not, without the prior approval of the Director General issue any bonds, notes, equipment trust certificates, stock, or other securities, or enter into any contracts (except contracts in respect of corporate affairs and property not taken under Federal control), or agree to pay interest on their debts at a higher rate, or for rent of leased roads and properties a larger amount, than the rates and amounts payable as of, or required by contracts in force on, December 31, 1917. The Companies may, however, procure the authentication and delivery to them under any mortgage or trust deed or agreement in force December 31, 1917, of bonds or notes issuable thereunder in respect of additions, betterments, extensions, and equipment, or for refunding purposes.

(d) Upon the cost of additions and betterments, less retirements in connection therewith and upon the cost of road extensions, made to the property of the Companies during Federal control, the Director General shall, from the completion of the work, pay the Company a reasonable rate of interest, to be fixed by him on each occasion. In fixing such rate or rates he may take into account not merely the value of mnoey but all pertinent facts and circumstances, whether the money used was derived from loans or otherwise, provided that to the extent that the money is advanced by the Director General or is obtained by the Companies from loans or from the proceeds of securities the rate or rates shall be the same as that charged by the Director General for loans to the Companies or to other companies of similar credit.

(e) From the compensation so received or from other income, if adequate for the purpose, the Companies shall make all payments of interest, rents (other than the equipment rents, joint facility rents, and rents classified as operating expenses mentioned in paragraph (j) of section 4 hereof), and other sums necessary to prevent a default under any mortgage or lease of any of the property described in paragraph (a) of section 2 hereof; and if at any time during Federal control the Companies, by virtue of

any change in the right of possession (subject to the rights of the United States) to any of said property or otherwise, shall no longer be entitled as between themselves and any other person or corporation, not a party to this agreement, to receive the entire compensation herein provided, such compensation shall be apportioned and paid as between those entitled thereto, as justice and right may require.

(f) The Director General shall, in addition to the compensation set out in paragraph (a) of this section, pay to the Company each year, in quarterly payments on the last days of March, June, September and December, as compensation for the leasehold rights assigned to him by the Company in the properties mentioned in paragraph (e) of the preamble of this agreement, the sum of Ninety Nine Thousand Nine Hundred and Seventy-eight Dollars and Fifty-five cents ($99,978.55), being the interest at five per cent. on the capital expenditures made as hereinbefore mentioned of One Million Nine Hundred and Ninety-nine Thousand Five Hundred and Seventy Dollars and Ninety Cents ($1,999,570.90), together with a depletion charge of three cents per net ton on the coal removed from said Howard Collieries and a depreciation charge of seven cents per net ton on the coal removed from Howard Collieries and Vulcan Colliery.

[fol. 94] Section 8.—Claims for Losses on Additions, etc.

Sec. 8. (a) Prompt notice in writing, except as provided in paragraph (d) of this section, shall be given the Companies of the making or ordering of any additions, betterments, or road extensions, including terminals, motive power, cars, or other equipment to or for the property of the Companies costing more than one thousand dollars, with an estimate of the cost thereof. Such notice shall be given before the beginning of the work or the acquisition of the property whenever in the judgment of the Director General it is practicable to do so. Within a reasonable time after the completion of the work or the acquisition of the property, a written statement of the final cost thereof shall be given the Companies. There shall be furnished the Companies, as soon as practicable after the end of each month, a written statement of all expenditures estimated to cost one thousand dollars or less chargeable to invest-

ment in road and equipment made during the month, with a brief description of the work done or of the property acquired; and such statement shall constitute all the notice of additions and betterments costing one thousand dollars or less required by (b) and (c) of this section. The notices provided in this paragraph may be given to the president of the Company unless the Company designates some other officer to receive the same, in which event the notice shall be given to such other officer.

(b) Any claim of the Companies for loss accruing to them by reason of expenditures for additions and betterments made to their property during Federal control in connection with or as a part of the work of maintaining, repairing, and renewing the Companies' property and chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, except such expenditures as are incurred in connection with the replacement of buildings and structures in new locations, may be determined by agreement between the Director General and the Companies, or, failing such agreement as to the fact or amount of such loss, the questions at issue may, upon the application of the Director General or the Companies at any time after the filing of the statement of claim hereinafter referred to, be ascertained in the manner provided in section 3 of the Federal control act: Provided, however, That no loss shall be claimed by the Companies and no money shall be due them in respect of such additions and betterments upon the ground that the actual cost thereof at the time of construction was greater than under other market and commercial conditions; and for the purpose of determining such controversy the amount paid for any addition or betterment shall be deemed the fair and reasonable cost thereof and shall be taken as the basis for such determination; nor unless the Companies, within sixty days of notice to them that the work will be done, shall give the Director General notice of objection thereto and shall file with the Director General a statement of claim within ninety days after notice of the completion of the work.

(c) Any claim of the Companies for loss accruing to them by reason of any additions and betterments which are not made in connection with or as a part of the work of

maintaining, repairing, and renewing the Companies' property, or accruing to them in connection with maintenance in the replacement of buildings and structures in new locations, or by reason of road extensions, terminals, motive power, cars, or other equipment made to or provided for the property of the Companies during Federal control, may be determined by agreement between the Director General and the Companies, or failing such agreement as to the fact or amount of such loss, may, by proceedings instituted not later than six months after the end of Federal control, be ascertained in the manner provided in section 3 of the Federal control act: Provided, however, That no loss shall be claimed by the Companies and no money shall be due to them in respect of such additions, betterments, road extensions, terminals, motive power, cars, or other equipment mentioned in this paragraph upon the ground that the actual cost thereof at the time of construction or acquisition was greater than under other market and commercial conditions; and for the purpose of determining such controversy the amount paid for any additions, betterments, [fol. 95] road extensions, terminals, motive power, cars, or other equipment shall be deemed the fair and reasonable cost thereof and shall be taken as the basis for such determination; nor unless within sixty days after notice to the Company of such construction or acquisition written notice is given to the Director General by the Company that a loss will be claimed in respect thereof. With and as a part of such notice the Company shall state the objections to such construction or acquisition as far as reasonably practicable at the time. Nothing in this agreement shall be construed as barring the United States from contending that no loss within the meaning of the Federal control act accrued to the Companies by reason of any additions, betterments, or road extensions made during Federal control by order or approval of the Director General, if it is made to appear that the Companies themselves but for Federal control should in the exercise of sound judgment have made such addition, betterment, or road extension.

(d) Where additions, betterments, or road extensions or terminals, motive power, cars, or other equipment have been made to or provided for the property of the Companies during Federal control but prior to the execution of

this agreement, the Director General shall not be required to give the notice thereof provided for in paragraph (a) of this section and notice by the Company of any claim of loss in respect thereto may be given the Director General within ninety days after the execution hereof; and such claims shall thereafter be proceeded with in the manner provided in paragraph (b) or paragraph (c) of this section, as the case may be.

(e) The Director General shall reimburse the Companies for the amount of loss ascertained under this section with a proper adjustment of interest thereon.

(f) The Director General shall not acquire any motive power, cars, or other equipment at the expense, or on the credit, of the Companies in excess of what in his judgment is necessary, in addition to their then existing equipment, to provide for the traffic requirements of their own systems of transportation; but this provision shall not prevent the Director General, after the acquisition of such equipment, from using the same, or any part thereof, on the line of any other transportation system operated by him.

[fol. 95½] Section 9.—Final Accounting

Sec. 9. (a) At the end of Federal control all the property described in paragraph (a) of section 2 hereof shall be returned to the Companies, together with all repairs, renewals, additions, betterments, replacements, and road extensions thereto which have been made during Federal control, except as any part thereof may have been destroyed or retired and not replaced, in which case the provisions of section 5 hereof shall govern and except that the Director General shall not be obliged to restore or replace property destroyed or damaged by the acts of public enemies.

(b) At the end of Federal control the Director General shall return to the Companies all uncollected accounts received by him from them and also materials and supplies equal in quantity, quality, and relative usefulness to that of the materials and supplies which he received, and to the extent that the Director General does not return such materials and supplies he shall account for the same at prices prevailing at the end of Federal control. To the extent that the Companies receive materials and supplies in excess of

those delivered by them to the Director General they shall account for the same at the prices prevailing at the end of Federal control and the balance shall be adjusted in cash.

(c) The total amount of the account "Net balance receivable from agents and conductors" at the end of Federal control may be turned over by the Director General to the Company. He may also turn over all assets which have accrued out of operation; and the Company shall, to the extent of the cash received or realized from such assets, pay and charge to the Director General all expenses arising out of railway operations during Federal control, including reparation and other claims, and may, unless objection is made by the Director General, pay and charge to him any such expenses, including reparation and other claims, in excess of the cash so received or realized. On the first day of the third month following the termination of Federal control an accounting between the parties shall be had, and so on the first of each third month thereafter. Any balance found due either party shall be payable as of the date on which the account is stated and shall bear interest until paid.

(d) At the end of Federal control there shall be paid to the Companies any balance then remaining unpaid of the cash received from them at the beginning of or during Federal control, together with any unpaid interest which may have accrued upon the same. There shall also be paid to the Companies any funds created under the provisions of this agreement except to the extent that such funds may have been properly used under this agreement.

(e) Wherever under any provision of this section there is to be an adjustment of interest, it shall be at the rate of five per cent per annum, unless the parties shall in any case agree on a different rate.

(f) After Federal control no claim by or against the Director General shall be settled by the Companies against the written objection of the Director General or the Attorney General of the United States. The conduct of all litigation before any court or commission arising out of such disputed claims or out of operations during Federal control shall be in charge of the Companies' legal force and the expense thereof shall be paid by the Companies; but the

Director General or the Attorney General may, at the expense of the United States, employ special counsel in connection with any such litigation.

[fol. 96] Execution

In witness whereof, these presents have, on the day and year first above written, been duly signed, sealed and delivered by William G. McAdoo, Director General of Railroads, and by the Norfolk and Western Railway Company and by each of the Affiliated Companies, parties hereto of the second part, by their respective Presidents, or Vice-Presidents, with their respective corporate seals hereto affixed, attested by their respective Secretaries or Assistant Secretaries; such execution and delivery on the part of said Companies having been duly authorized by their respective Boards of Directors at meetings duly called and held on various dates, said Board of Directors having been thereto duly authorized, in the case of the Norfolk and Western Railway Company, at an adjourned meeting of the stockholders thereof duly called and held on the 29th day of November, 1918, at the principal office of the Company at Roanoke, Virginia, and, as to the Affiliated Companies, by meetings of the stockholders thereof duly called and held at Roanoke, Virginia, on the 29th day of November, 1918, as will appear by certificates of such meetings of said Boards and of said stockholders, duly attested by the respective Secretaries or Assistant Secretaries of said Companies, lodged with the Director General of Railroads.

W. G. McAdoo, Director General of Railroads. J. B. P. (Seal Director General of Railroads.) Norfolk and Western Railway Company, by L. E. Johnson, President. Attest: E. H. Alden, Secretary. (Seal Norfolk and Western Railway Company, Virginia. Organized 1896.) Virginia-Carolina Railway Company, by L. E. Johnson, President. Attest: E. H. Alden, Secretary. (Seal Virginia-Carolina Railway Company, January 19th, 1900.) New River, Holston and Western Railroad Company, by L. E. Johnson, President. Attest: E. H. Alden, Secretary. (Seal New River, Holston & Western Railroad Company. Incorporated January, 1900.) Williamson and Pond Creek Railroad Company,

by L. E. Johnson, President. Attest: E. H. Alden, Secretary. (Seal Williamson and Pond Creek Railroad Company. Incorporated under Laws of Kentucky March 19th, 1912.) Tug River and Kentucky Railroad Company, by L. E. Johnson, President. Attest: E. H. Alden, Secretary. (Seal Tug River and Kentucky Railroad Company. Incorporated under Laws of Kentucky Jan. 12th, 1914.)

[fol. 96½] The Norfolk & Western did not own the Pond Creek Colliery at the time of the agreement with the Director General but this property was acquired subsequent to the return of the property to the carrier which accounts for the fact that it was not included in the said agreement.

Cross-examination:

There are two occasions of recorded proceedings of the Board of Directors of this carrier pertaining to the acquisition of the coal properties not included in Exhibit 19. The first was a report made May 26, 1920 by the President of the company with reference to the purchase of the stock of Pond Creek By-Products Company offering suggestions for the acquisition of the properties. This was in part a resolution and in part a report which might be termed in the nature of a preamble which led to the adoption of the resolution approving the action or suggestion made by the President. The first action was taken May 26, 1920 and the second August 3, 1920.

[fol. 97] The record of these two actions are the ones I referred to as not furnished.

The record of the minutes of the meeting of May 26, 1920 was offered and admitted in evidence as Commission's Exhibit No. 21 and the record of the minutes of the meeting of August 3, 1920, was offered and admitted in evidence as Commission's Exhibit No. 22.

[fol. 98] INTERSTATE COMMERCE COMMISSION

EXHIBIT No. 21

Witness: Booth

It is hereby certified that the following is a true and correct excerpt from the minutes of a stated meeting of the

Board of Directors of the Norfolk and Western Railway Company held in the City of Philadelphia, Pa., on May 26th, 1920, at which meeting more than a quorum of the Board was in attendance.

Contracts have been made for about seventy-five percent of our fuel coal consumption, at an average rate of slightly under $4.00. We are unable to make any further contracts with our operators, their uniform answer being that they have already sold all of their coal. The price being paid for coal from mines on the Norfolk & Western for export is as high as $8.00 or $9.00 per ton at the tipple. I think the average is above this. This makes it difficult for us to procure our fuel coal supply at a reasonable price.

The average cost of fuel coal from our own mines in April was $2.19 per net ton. Coal from other mines averaged $3.29. The average cost of all fuel coal was $3.12 in April, as against $2.91 in March and $2.76 in February.

Messrs. W. C. Atwater and McQuail and others bought the American Coal Company, which I was negotiating for a month ago; in fact they had secured most of the stock before I started negotiations.

I recommend that we purchase the Pond Creek By-Product Coal Company's property, which consists of about 1,200 acres of coal land under lease. It has a going operation on the Kentucky side of Tug River at Williamson, W. Va., the western terminal of the Pocahontas Division. The Pond Creek seam is located at an elevation of about 20 feet above the railroad grade at mouth of Pond Creek, is the first seam on the property above water level, and underlies 1,118 acres. The seam varies in thickness from 33½ to 47 inches, and ought to yield about five million tons of coal. The Upper [fol. 99] Thacker seam occurs at an interval of about 300 feet above the Pond Creek seam, and underlies approximately 500 acres. We figure that there are about 2,500,000 tons of coal from this seam available on the property. The Lower Thacker seam occurs at an interval of about 75 feet below the Upper Thacker and underlies approximately 550 acres. There are two other seams underlying 300 acres and 200 acres respectively, and another which has not been prospected covering about 150 acres.

I have a detailed report on the property, which shows that about 5,000 tons are now mined monthly, but we believe with additional equipment and further development of the mine we could increase this tonange to 15,000 tons monthly by the

end of the second year. Our idea would be to open the upper seams and not develop the lower seams extensively until the removal of the coal in the upper seams.

The actual expenditures on this property so far amount to approximately $150,000. We believe we can purchase the property as it stands for $300,000, but the proper development of it would entail additional expenditures amounting to about $400,000, this amount to be extended over a period of one and one-half to two years. We can build a coaling station at Williamson at a cost of about $125,000, and convey this coal from the mine direct to the coaling station so as to coal all of our road and switch engines at Williamson, instead of coaling the road engines out on the line at overhead coaling stations, as at present. It seems reasonable that on the price of coal and by coaling engines at the terminal we can make a saving of $100,000 per annum.

The average cost of coal at the mines owned by the Norfolk & Western in the month of April, as stated above, was $2.19 per net ton. We think the coal at the Pond Creek By-Product Coal Company's tipple can be mined for $2.50 per ton.

The stock of this leasing company is in the hands of a [fol. 100] few people, and is now controlled and can be delivered to us, in case of purchase, by Mr. S. H. Goodloe of Williamson, W. Va.

The royalties paid to five different owners are: 16 cents per ton to three; 14 cents per ton to one; and 12½ cents per ton to the other. The minimum royalty to all is $14,300 per annum.

We are offered another small lease, but I am still looking into it to see if the coal tonnage in the property is a sufficient amount to warrant the railroad purchasing it.

The following resolution was, on motion, adopted:

Resolved, That the President be and he is hereby authorized to negotiate for the purchase of the entire capital stock of the Pond Creek By-Product Coal Company at a cost of approximately $300,000.

Attest:

I. W. Booth, I. W. Booth, Secretary.

(Exhibit 22 omitted from printing by stipulation of counsel.)

[fol. 100½] As far as I know the terms of the agreement with the Director General of Railroads was carried out but it is not within my personal knowedge whether the Director General actually took over the coal properties.

Redirect examination:

The resolutions of the Board of Directors of May 26, 1920 and August 3, 1920 provided for the Norfolk & Western buying capital stock of the Pond Creek Coal Company and it is my understanding that the carrier did buy such stock but does not now own the same. The corporation (Pond Creek Coal Company) was dissolved shortly after the assignment to the Norfolk & Western of the lease of Pond Creek Colliery and the stock cancelled. The ownership of the Norfolk & Western in this mining property is by leases and the assignment of those leases, which is the only interest of the carrier in the Pond Creek Colliery.

[fol. 101] George Dunglinson, Jr., having been previously duly sworn, testified further on direct examination continued:

I was in charge of the coal mines of the Norfolk & Western Railway Company during the war subsequent to their acquisition. The Federal Government took over the coal mining properties as a part of the railroad system when it took over the railroad operation. At that time the carrier owned only two mines both of which were taken over as a part of the transportation system.

I had nothing to do with the settlement between the government and the carrier and for that reason do not know whether or not the railway company received payment for the use of the mining property as it did other transportation property.

I have copies of leases which have been assigned to the railway company in connection with these mining properties.

I will take up the title papers Exhibits 7 to 13, inclusive, which cover the assignments, deeds and other conveyances of the Howard Collieries properties. These properties at the time of purchase consisted of two mining corporations, the Howard Colliery Company and the Howard, Jr. Coal Company, which mining companies were operating under

lease from the Buffalo Land & Coal Company, and the Howard Land Company. These two land companies were associated companies under the control of the mining companies.

In addition, Mr. F. L. Schoew, who was president of the operating companies, owned an additional tract of land, [fol. 102] which was in his name, for the Howard Land Company, but had not been transferred to that company.

Our purchase of these properties consisted in the purchase not only of the mining companies, but of the land companies and the land vested in the name of F. L. Schoew.

The various tracts owned and partially leased to the operating companies consisted of a boundary of land of approximately 2,685 acres.

The Howard Colliery Company was also operating under lease a tract of land of 190 acres, reference to which will subsequently be made.

In closing the purchase deal the officers and counsel of our company decided that it would be preferable that the fee title to the land be not vested in the Norfolk & Western Railway Company but in the Pocahontas Coal & Coke Company, a subsidiary company. Therefore, in drawing up the transfer papers all of the existing leases as well as new leases on land not then under lease were transferred or leased to the Norfolk & Western Railway Company, together with deeds of conveyances for the improvements and personal property of all companies with the exception of cash on hand and accounts receivable. In order to vest in the railway company the full mining rights on all coal and other mineral the papers stipulated that all royalties and other rentals had been anticipated and paid as a part of the consideration for transfer of the property and that no [fol. 103] further royalties or rents would be due and payable except an annual rental of $30.00 and the payment of all taxes which would accrue.

Now we will take up Exhibit No. 7 deed of lease, May 29, 1917, Frederick L. Schoew, et ux. and Howard Land Company, to Norfolk & Western Railway Company.

This is a lease to the Norfolk & Western Railway Company by Frederick Leonard Schoew and wife on 500 acres of land for a period of 50 years with all considerations paid upon the execution and delivery of the lease except $10.00 per annum.

The lease grants the railway company the right to mine all coal, oil, gas and other minerals without limitation or restrictions; the right to use all timber; the right to use the surface of the land for all operating purposes.

A description by metes and bounds of the 500 and a fraction acres referred to in Exhibit 7 cannot be found in that instrument nor in the lease referred to on page 2 of Exhibit 7, but it can be found in the records of Deed Book 25, page 547, Mingo County, West Virginia. I have, however, a blue print which shows the location of the said 500.1 acre tract as well as the location of other tracts covered by the transfer papers, exhibits 7 to 13.

This blue print was offered and admitted in evidence as Carrier's Exhibit 23.

(Exhibit 23 omitted from printing by stipulation of counsel.)

I did not make the map but it was made by our engineering department and I feel that it does accurately show the John Thompson tract (500.1 acres). The boundaries of [fol. 104] the tract are shown by a broken green line.

Exhibit No. 8, Deed of Assignment between Howard Colliery Company, Buffalo Land & Coal Company and the Norfolk & Western Railway Company dated May 29, 1917 assigns to the carrier certain leases under which the Howard Colliery Company was then operating and deeds to the company all property of the Colliery Company which, consisted of mine improvements, equipment, merchandise, etc., with the exception of cash on hand. The acreage of one lease is stated as 1,036 and that of the other lease is not stated and I cannot state it. Exhibit 23 does not show as a unit of 1,036 acres covered by the conveyance from the Buffalo Land & Coal Company described in paragraph "A" on page 1, Exhibit 8. The acreage covered by both leases is not shown by group acreages but by tracts and is outlined on the map with broken black lines. I do not know how much land is included in the area marked with the broken black border on Exhibit 23 and I would not be able to calculate that because some tracts which are shown are not entirely within the boundary, part of the acreage being outside of the leased area and part within due to previous deeds and exceptions of acreage. Both leases covered by

Exhibit 8 are embraced within the broken black border but it does not include other property. There may be small acreages of other leases overlapping in either direction the area shown within the black border.

Exhibit No. 9 leases to the Railway Company all of the land owned by the Buffalo Land & Coal Company which embraces the two leases just described together with any land which may not have been included in those leases but owned by the Buffalo Land & Coal Company. It gives the railway company right to mine, all coal, oil, gas and other [fol. 105] minerals without the payment of any rents or royalties, all rents and royalties having been anticipated as a part of the cash consideration. The acreage covered by Exhibit 9 is practically the same covered by the broken black border in Exhibit 23. The 1,036-acre-tract mentioned in paragraph 1, p. 2 of Exhibit 9 is the same tract described in Exhibit 8. The conveyance by the land company to Everett Leftwich mentioned in paragraph 2 on page 2 of Exhibit 9 is generally speaking in the western part of the broken black boundary, I cannot give the acres involved. Tracts 9 and 11 consisting of 109.6 acres and 145.4 acres are shown and marked as such on Exhibit 23 and are referred to in paragraph 3 on page 2 of Exhibit 9 as a conveyance from Doolittle, as Trustee, recorded in Mingo County, West Virginia, Book 11, at page 54. The latter reference, however, describes those portions of tracts 9 and 11 which are not embraced within the leases above referred to.

The 27.75 acres described in the lease from the Howard Colliery Company of record in Book 30, at page 224 of said county referred to in paragraph 4, page 3 of Exhibit 9 is shown on Exhibit 23 as a 27.75-acre tract just to the left of the Rufus Diamond tract between tracts 6 and 9 and is indicated by a line with two arrows on it.

The railway company paid $1,515,000.00, subject to some minor changes for expenses, for the full mining rights, all property of the mining companies, all anticipated royalties and rents on the 2,875 acres of land together with all improvements and equipments of mining companies. A lease put in evidence as Exhibit 9 was only a part of the [fol. 106] consideration for the payment of $1,515,000.00.

Exhibit No. 10 is an assignment to the Railway Company of a lease held by the Howard, Jr. Coal Company on 623.93

acres with one or more small tracts, and deeds to the carrier all improvements and equipment of the coal company. The total acreage involved in this transfer was some 640 or 650 acres and is shown on Exhibit 23 by broken yellow lines marked also "Watson and O'Keefe" at the top of the map. The smaller parcels are not indicated on the map but were brought about by changes and corrections in the land lines between the Watson and O'Keefe tract and the property to the west thereof.

I cannot identify the exact lines that were changed or the exact lines of the small acreage but generally speaking the yellow broken line indicates the property leased by Exhibit 10, nor can I state whether those small acreages are separate or are a part of the 623-acre-tract. There are other small parcels covered in Exhibit 10.

Exhibit 11 covers a lease to the Railway Company of what is referred to as the Harris tract which consists of 190 acres by estimate. All royalties and rentals have been anticipated and paid for with the exception of $10.00 per year. This acreage is shown on Exhibit 23 with a broken brown line indicated as Robert L. Harris 190-acre-tract.

These Exhibits complete the title papers covering the original purchase of the Howard Collieries consisting of 2875 acres. All rents and royalties have been anticipated and paid with the exception of $30.00 per year and taxes to be paid by the carrier. Consideration for all rights and [fol. 107] properties conveyed to the Norfolk & Western was $1,515,000 subject to minor adjustments. The fee title to the land is vested in the Pocahontas Coal and Coke Company, a subsidiary company, it having paid $2,875.00 therefor. The $1,515,000.00 was a lump sum paid for all rights and properties in the original Howard purchase and no particular sum or amount was allotted for any individual property lease or right.

Exhibit #12 is a copy of a lease from the Sycamore Coal Company to the carrier of approximately 66 acres. This tract is not shown on Exhibit 23 as that exhibit covers only the original Howard purchase. Exhibit 12 is a subsequent and additional lease. Going back to my Exhibit No. 1, it shows the original Howard purchase explained by the pink outline on the key map in the upper left hand corner of Sheet 1-W, marked "original purchase". The boundary outline in pink is the acreage embraced in the land leased, re-

leased and reconveyed by Exhibits 1 to 11, inclusive. The land covered by Exhibit No. 12 is indicated at the extreme lower right hand corner of the key map with a yellow outline and is marked Sycamore lease.

The land covered by Exhibit 13 is not shown on Exhibit 23, but is shown on Exhibit 1 key map at page 1-W indicated by a yellow outline in the upper part, marked "Cotiga Leasehold". All of the consideration, conditions and carrying charge under the lease are set forth in the instrument filed as Exhibit 13. The acquisition cost of $250,000.00 is not set out therein. The Carrier paid $250,000.00 for obtaining the leasehold rights granted by Exhibit 13. There was no consideration paid for the conveyance in Exhibit 12. The total consideration paid for what is known [fol. 108] as the Howard Collieries was $1,515,000.00 plus $250,000.00.

Vulcan Collieries consist of various coal leases, timber leases and surface leases formerly held by the Vulcan Coal Company and the physical property in the way of improvements and equipment.

Exhibit 14 is the instrument of conveyance by which the leases were assigned to the carrier and the physical property conveyed to it. Under the first "witnesseth", paragraph "A" assigns a lease of three tracts of land specified therein and the paper I here offer is the lease therein referred to.

The witness offered and there was received in evidence Exhibits 24 to 37, both inclusive, which were various leases assigned and referred to in Exhibit 14. In order to identify these latter exhibits with Exhibit 14, they are tabulated as follows:

Reference to page and paragraph in Exhibit 14	No. of exhibit
Paragraph "A", page 1	24
" "B", " 1	25
" "C", " 1	26
" "D", " 1	27
" "E", " 1	28
" "F", " 1	29
" "G", " 1	30
" "A", " 2	31
" "B", " 2	32

Reference to page and paragraph in Exhibit 14	No. of exhibit
Paragraph "C", page 2	33
" "D", " 2	34
" "E", " 2	35
" "F", " 2	36
" "G", " 2	37

(Exhibits 24 to 37, both inclusive, omitted from printing by stipulation of counsel.)

Exhibit 24 is a copy of the lease under which the Vulcan Coal Company operated and under which the carrier now operates and embodies in it the terms and conditions thereof with a full description of all of the acreage involved. It includes the consideration to be paid in the way [fol. 109] of royalty, but does not include the consideration or any consideration paid for the acquisition of the lease. There was no allocated consideration for the assignment of this particular lease. All the leaseholds and property of the Vulcan Coal Company were purchased for a lump sum amount which purchases embraced all of the leasehold rights, improvements and personal property of the Vulcan Coal Company with the exception of the cash on hand and accounts receivable. The option price of this property and rights was $450,000.00 to which was to be added the actual costs of improvements and betterments added to the plant during the period between the option date and the consummation of the deal.

There was a controversy over the title to the tract of 54 or 55 acres and in the final analysis, the owners of the Vulcan Coal Company were paid $423,744.84 This amount, together with incidental expenses in connection with the purchase is indicated on Exhibit 4 and the total amount paid for the Vulcan Colliery was $424,562.20.

Exhibit 25 is a lease from Ralph Steele and Sarah Steele to the Vulcan Coal Co., Inc., recorded in D. B. 24, p. 210. This exhibit includes a description of the acreage thereby conveyed. It shows the rents and royalties to be paid by the lessee to the lessor, but does not show the consideration paid by the N. & W. for the acquisition of this lease. There was no allocation of consideration to any particular lease obtained from the Vulcan Coal Company but the consideration for the assignment of all leases was covered by

one lump sum amount paid to the Vulcan Company. The lease filed as Exhibit 25 was originally made between Ralph Steele and wife to the Vulcan Coal Co., but subsequent thereto A. L. Rice became the owner of this property and [fol. 110] this lease is indicated on all maps as the "Rice Lease".

Exhibit 26 is a lease originally from David J. Wolfford, but this land was likewise subsequently acquired by A. L. Rice and is so indicated on all maps introduced in evidence. The property covered by this lease is defined by metes and bounds and according to property lines, the acreage involved being approximately 35 acres.

Exhibit 27 is the lease between Henry C. Nash, Trustee, and the Vulcan Coal Company, recorded in D. B. 41, p. 71, Pike County, Kentucky and the land leased is described therein. This lease is now referred to on the map exhibits as the "Pike County Coal Company Lease", for the reason that the land, subject to the terms of the lease, was conveyed to the Pike County Coal Company. There is no relation between the Norfolk & Western Railway Company and the Pike County Coal Company, except that the carrier pays the royalties to the Pike County Coal Company, the latter being the lessor and the former being the lessee. There is no relation existing between the carrier and any coal companies whose interests were purchased by the carrier.

Exhibit 28 is not a coal lease, but simply a deed for additional timber rights on property previously leased. This document is complete in itself.

Exhibit 29 is likewise a deed for additional timber rights on property previously leased.

Exhibit 30 is a copy of a lease between Alexander Mounts and wife to the Vulcan Coal Company, recorded in Lease Book 3, p. 292, Mingo County, West Virginia. It is a lease—not on coal land—but on surface land used as a part [fol. 111] of the camp site of the Vulcan Coal Company, on which is located houses, tipple and other improvements. A description of the land and the rental for the use thereof is included in the paper.

Exhibits 31, 32, 33 and 34 are leases of several small parcels of land and Exhibit 35 is a lease on the land therein described. There are apparently two documents referred to under paragraph "e" of page 5, Exhibit 14.

Exhibit 35 is the document referred to as being recorded in D. B. 27, p. 373, Mingo County, West Virginia.

I am unable to find the instrument referred to under paragraph "F", p. 5-, which deeds a parcel of land containing 6 acres, more or less, * * * recorded in the Clerk's Office of the County Court of Mingo County, West Virginia, in D. B. 33, at page 68". I do have, however, a copy of the deed covering the same parcel of land as deeded to David Mounts, but do not have a copy of the deed where Mounts conveyed it to the Vulcan Coal Company. I am confident that the description of the land in the instruments recorded in D. B. 27, p. 373 and in D. B. 30, p. 558 is the same.

Paragraph "E" will be cleared up and completed by furnishing a copy of the instrument recorded in D. B. 30, p. 558.

Exhibits 36 is the instrument covering the 6-acre tract to David Mounts.

The witness repeated that Exhibits Nos. 24 to 37, both inclusive, are copies of the instruments referred to in Exhibit 14 and included within their pages descriptions of the property involved. The consideration moving from the [fol. 112] carrier for the purchase of the rights under said instruments is included in the lump sum amount previously referred to as having been paid for the property by the Vulcan Coal Company, which included the leases and the personal property.

On Exhibit No. 2, observing from the key map, the property outlined in pink embraces the leaseholds described as being obtained by the Norfolk & Western under Exhibit 14.

It shows within the outside boundaries small subdivisions noted therein by the names of the various lessors and can readily be identified from the description in the papers themselves and tied into the map. The key map referred to is on sheet 1-PC of the exhibit and in the larger and more detailed maps sheets 1-PC and 2-UT, the various lease lines are also indicated as well as the lessors.

The lines of the surface leases are more clearly indicated on the body of sheet 1-PC than on the key map. All surface leases lie north of the stream indicated as Tug Fork. The lease of surface land from Alexander & Rebecca Mounts, his wife, form the larger of these surface leases and lies north of Tug Fork and on both sides of the railroad right-of-way. The smaller surface leases are not indicated by

name, but the division lines are indicated on the map and can readily be identified from the descriptions given in the lease papers. All the details are shown on this map much more clearly than can be shown on a map similar to Exhibit 23.

The leases just introduced covering the Vulcan property correspond to sheet 1-PC of Exhibit No. 2 and are tied up [fol. 113] with the descriptions of the divisions in the key map. The supplemental lease shown on the map as being obtained from the Majestic Colliery Company is covered by Exhibit No. 16. The lease covered by Exhibit 15 is from the Pike County Coal Company for an additional coal seam on property already leased to the company under paragraph "D", p. 2 of Exhibit 14, but includes no additional acreage, just an additional coal seam in the same acreage.

The Pond Creek Colilery consists of the former property of the Pond Creek By-Products Company and the leases held by it which were assigned by instrument introduced as Exhibit No. 17.

The witness offered—and there was received in evidence—Exhibits 38 to 45 both inclusive, which were various leases assigned and referred to in Exhibit 17. In order to identify these latter exhibits with Exhibit 17, they are tabulated as follows:

Reference to page and paragraph in Exhibit 17	No. of exhibit
Paragraph "A", page 1	38
" "B", " 1	39
" 1, Sec. "C", p. 1	40
" 2, " " " "	41
" 3, " " " 2	42
" 4, Item "C", p. 2	43
Clause "D", page 2	44
Paragraph "E" page 2	45

(Exhibits 38 to 45, both inclusive, omitted from printing by stipulation of counsel.)

I do not have available copies of other instruments referred to under paragraph "B", p. 1 of Exhibit 17, but I shall obtain copies and introduce them later.

Exhibit 43 recorded in D. B. 94, at p. 249 is recorded in Pike County, Kentucky, In paragraph 4, Item "C", page 2 of Exhibit 17, the second clause refers to an assignment of the four foregoing leases (Exhibits 40, 41, 42 and 43). I

[fol. 114] shall, at a later time, introduce copy of that assignment.

The papers filed as Exhibits 38 to 45, both inclusive, are all of the leases and papers referred to in Exhibit No. 17, which cover the assignment of coal and other leases from the Pond Creek By-Products Company to the Norfolk & Western Railway Company, together with all mine improvements. These exhibits, together with other exhibits which I have stated I would furnish for the record in further amplification of Exhibit 17, contain detailed descriptions of all the acreage therein involved. The land described in said leases can be readily identified on the last page of Exhibit No. 3. The original purchase which was covered by Exhibit 17 is outlined with a pink border embraced within the area of that boundary. Within the said boundary appear the names of W. G. Williamson, John B. Williamson, Roland Williamson, Alex Varney, Leckieville Land Company and F. H. Craig. These names refer to lessors mentioned in the title papers and the division lines between their leases are indicated by broken, dashed and dotted blue lines. The map just referred to is not the key map of Exhibit 3, but the larger map constituting the last page thereof. The key map gives the same information, except that it does not give the names of the lessors.

The consideration for the transfer of the leases enumerated in Exhibit 17 is not therein stated. For the rights and property of the Pond Creek By-Products Company a lump sum of $343,231.10 was paid. I am the George Dunglinson, Jr., whose name appears as President at the end of Exhibit 17.

Exhibit 18 covers a lease obtained subsequent to the orig-
[fol. 115] inal purchase of the Pond Creek By-Products Coal Company and the boundary lines of that lease are indicated on the same last sheet of Exhibit 3 outlined in yellow, with the name Rogers Bros., Tracts 1 to 5, inclusive. The sum of $343,231.10 stated as a consideration for the assignments of the leases set forth in Exhibit 17, included personal property purchased from the Pond Creek Coal Company. That money was paid by the railway company partly to the stockholders of the Pond Creek By-Products Company and partly to the company itself. All of the capital stock of the latter company was purchased and as soon thereafter as was possible, the Pond Creek

By-Products Company deeded and assigned all of its property to the carrier, whereupon the Pond Creek Coal Company was immediately dissolved, passed out of existence and its stock cancelled. The ownership of the stock by the railway company was a temporary procedure leading up to and in connection with the purchase of the property. During the ownership of the said stock by the carrier, I was President of the Pond Creek By-Products Coal Company. I now have no connection with the Pond Creek By-Products Coal Company. The Norfolk & Western Railway Company is the lessee under all the leases.

I testified on December 17, 1928 that the estimated tonnage in the coal property at the time of the purchase was 4,135,000 tons. This figure should have been 4,153,000 tons. The error was a typographical one made in transcribing the papers preparatory to my testimony. I also on that date testified that the production of this colliery since purchased by the company has been 2,024,217 tons, leaving the estimated tonnage 15,415,783 tons as of September 30, 1928. A typographical error was made there also. The production of the colliery since the purchase by the carrier has been 2,084,217 tons. The remaining estimated tonnage in the [fol. 116] ground is correct, as previously testified.

Here was offered and received in evidence Exhibits 46 and 47.

Here follow Exhibits 46 and 47.

The last two exhibits were the Act of the Legislature of Virginia approved January 18, 1896, and a pamphlet entitled "Plan of Organization of Norfolk & Western Rwy. Company dated September 24, 1896", respectively:

(It appearing that the accounting records of the Commission contained full information as to the incorporation of the Norfolk & Western Railway Company, its powers, etc., it was stipulated that both parties be permitted to make any reference to that document which was on file with the Commission.)

The Bureau of Accounts has requested me to furnish statements on information concerning the operating expenses, etc., for the month of December, 1927.

Here was offered and received in evidence Exhibits Nos. 48 to 53.

M. D. 15
(Revised 1-1-24)

Exhibit 48

DETAILS OF MINING COST DECEMBER 192 7.

ITEMS	HOWARD COLLIERIES				VULCAN COLLIERY				POND CREEK COLLIERY				ALL COLLIERIES				
	Amount		Cost per Ton		Amount		Cost per Ton		Amount		Cost per Ton		Amount		Cost per Ton		
	$	c	$	c	$	c	$	c	$	c	$	c	$	c	$	c	
PAY ROLL—INSIDE																	
1—Mining	25,728	11		4391	6,558	20		4426	19,139	10		5551	51,425	41		4767	1
2—Yardage	2,304	17		0393	1,118	40		0755	1,151	66		0334	4,574	23		0424	2
3—Haulage	5,917	63		1010	1,798	62		1214	3,492	47		1013	11,208	72		1039	3
4—Ventilation	307	60		0053	221	50		0149	740	50		0215	1,269	60		0118	4
5—Drainage	862	58		0147	24	20		0016	354	35		0103	1,241	13		0115	5
6—Track	4,005	80		0684	1,101	35		0745	1,701	85		0493	6,809	00		0631	6
7—Dead Work	2,021	00		0345	1,088	61		0735	1,477	17		0428	4,586	78		0425	7
8—Special Work	14	75		0005									14	75		0001	8
9—Foremen	2,492	25		0425	768	10		0519	1,586	25		0460	4,846	62		0449	9
10—																	10
11—																	11
Total Inside	43,653	89		7451	12,678	98		8557	29,643	35		8597	85,976	22		7969	
PAY ROLL—OUTSIDE																	
12—Dumpers and Drum Runners	2,045	55		0349	825	55		0557	617	90		0179	3,489	00		0323	12
13—Car Loaders	2,194	10		0375	572	10		0386	1,395	56		0405	4,161	76		0386	13
14—Blacksmith and Car Repairer	1,361	50		0232	318	80		0215	757	05		0220	2,437	35		0226	14
15—Mechanics and Electricians	487	35		0083	240	00		0162	225	00		0065	952	35		0088	15
16—Powerhouse and Substations	379	65		0065	147	00		0099	196	80		0057	723	45		0066	16
17—Coaling Station					90	90		0061	117	00		0034	207	90		0019	17
18—Special Work	1,952	30		0333	111	60		0076	213	30		0062	2,277	70		0211	18
19—																	19
20—																	20
Total Outside	8,420	95		1437	2,305	95		1556	3,522	60		1022	14,249	50		1321	
PAY ROLL—GENERAL																	
21—Superintendence	850	00		0145	527	00		0356	528	00		0153	1,905	00		0177	21
22—Office	820	00		0140	492	50		0332	612	50		0178	1,925	00		0178	22
23—Engineering	394	60		0067	197	31		0133	197	29		0057	789	20		0073	23
24—General Expense	343	60		0059	225	00		0152	384	20		0111	953	00		0088	24
25—Stable	255	20		0045	90	26		0061	193	55		0056	549	01		0051	25
26—																	26
Total General	2,673	60		0456	1,532	07		1034	1,915	54		0555	6,121	21		0567	
Total Pay Rolls	54,748	44		9344	16,517	00	1	1147	35,081	49	1	0174	106,346	93		9857	
FIXED AND OTHER CHARGES																	
27—Stable																	27
28—Supplies	8,836	76		1508	2,528	07		1706	7,740	57		2245	19,105	40		1771	28
29—General Expense	1,640	00		0280	196	90		0133	604	24		0175	2,441	14		0226	29
30—Electric Power	2,885	62		0493	1,041	07		0703	1,376	38		0399	5,303	07		0492	30
31—Insurance	170	02		0029	90	35		0061	108	16		0032	368	51		0034	31
32—Taxes	84	35		0014	147	00		0099	325	00		0094	556	35		0051	32
33—Workmen's Compensation	1,641	69		0280	676	39		0457	1,366	21		0397	3,684	29		0341	33
34—Depreciation Reserve	4,394	33		0750	1,852	09		1250	4,310	13		1250	10,556	55		0976	34
35—Depletion Reserve	2,929	55		0500									2,929	55		0272	35
36—Royalty	7,575	40		1293	816	61		0551	5,555	85		1611	13,947	86		1293	36
37—Maintenance Repairs	5,859	10		1000	740	84		0500	689	62		0200	7,289	56		0676	37
38—Expense Procuring Men																	38
39—Leasehold Rent					25	00		0017	200	00		0058	225	00		0021	39
40—Automatic Mine Doors	140	00		0024	12	00		0008					152	00		0014	40
Total Fixed and Other Charges	36,156	82		6171	8,126	30		5485	22,276	16		6461	66,559	28		6169	

	$	c		c	$	c		$	c		$	c		$	c		
PAY ROLL—INSIDE																	
1—Mining	25,728	11		4391	6,558	20		4426	19,139	10		5551		51,425	41		4767	1
2—Yardage	2,304	17		0395	1,118	40		0755	1,151	66		0534		4,574	23		0424	2
3—Haulage	5,917	63		1010	1,798	62		1214	3,492	47		1013		11,208	72		1039	3
4—Ventilation	307	60		0053	221	50		0149	740	50		0215		1,269	60		0118	4
5—Drainage	862	58		0147	24	20		0016	354	35		0103		1,241	13		0115	5
6—Track	4,005	80		0684	1,107	35		0745	1,701	85		0493		6,809	00		0651	6
7—Dead Work	2,021	00		0345	1,088	61		0735	1,477	17		0428		4,586	78		0425	7
8—Special Work	14	75		0003										14	75		0001	8
9—Foremen	2,492	25		0425	768	10		0519	1,586	25		0460		4,846	62		0449	9
10—																		10
11—																		11
Total Inside	43,653	89		7451	12,678	98		8557	29,643	35		8597		85,976	22		7969	
PAY ROLL—OUTSIDE																		
12—Dumpers and Drum Runners	2,045	55		0349	825	55		0557	617	90		0179		3,489	00		0323	12
13—Car Loaders	2,194	10		0375	572	10		0386	1,395	55		0405		4,161	75		0386	13
14—Blacksmith and Car Repairer	1,361	50		0232	318	80		0215	757	05		0220		2,437	35		0226	14
15—Mechanics and Electricians	487	35		0083	240	00		0162	225	00		0065		952	35		0088	15
16—Powerhouse and Substations	379	65		0065	147	00		0099	196	80		0057		723	45		0068	16
17—Coaling Station					90	90		0061	117	00		0034		207	90		0019	17
18—Special Work	1,952	80		0333	111	60		0076	213	30		0062		2,277	70		0211	18
19—																		19
20—																		20
Total Outside	8,420	95		1437	2,305	95		1556	3,522	60		1032		14,249	50		1321	
PAY ROLL—GENERAL																		
21—Superintendence	850	00		0145	527	00		0356	528	00		0153		1,905	00		0177	21
22—Office	820	00		0140	492	50		0332	612	50		0178		1,925	00		0178	22
23—Engineering	394	60		0067	197	31		0133	197	29		0057		789	20		0073	23
24—General Expense	343	80		0059	225	00		0152	384	20		0111		953	00		0088	24
25—Stable	265	20		0045	90	26		0061	193	55		0056		549	01		0051	25
26—																		26
Total General	2,673	60		0456	1,532	07		1034	1,915	54		0555		6,121	21		0567	
Total Pay Rolls	54,748	44		9344	16,517	00	1	1147	35,081	49	1	0174		106,346	93		9857	
FIXED AND OTHER CHARGES																		
27—Stable																		27
28—Supplies	8,836	76		1508	2,528	07		1706	7,740	57		2245		19,105	40		1771	28
29—General Expense	1,640	00		0280	196	90		0133	604	24		0175		2,441	14		0226	29
30—Electric Power	2,885	62		0493	1,041	07		0703	1,376	38		0399		5,303	07		0492	30
31—Insurance	170	02		0029	90	35		0061	108	16		0032		368	51		0034	31
32—Taxes	84	35		0014	147	00		0099	325	00		0094		556	35		0051	32
33—Workmen's Compensation	1,641	69		0280	676	39		0457	1,366	21		0397		3,684	29		0341	33
34—Depreciation Reserve	4,394	33		0750	1,852	09		1250	4,310	13		1250		10,556	55		0978	34
35—Depletion Reserve	2,929	55		0500										2,929	55		0272	35
36—Royalty	7,576	40		1293	816	61		0551	5,555	85		1611		13,947	86		1293	36
37—Maintenance Repairs	5,859	10		1000	740	84		0500	689	62		0200		7,289	56		0676	37
38—Expense Procuring Men																		38
39—Leasehold Rent					25	00		0017	200	00		0058		225	00		0021	39
40—Automatic Mine Doors	140	00		0024	12	00		0008						152	00		0014	40
Total Fixed and Other Charges	36,156	82		6171	8,126	30		5485	22,276	16		6461		66,559	28		6169	
Total Cost of Mining	90,905	26	1	5515	24,643	30	1	6632	57,357	65	1	6635		172,906	21	1	6026	
DEDUCTIONS																		
41—Coal Sold	656	50			196	50			349	30				1,202	30			41
42—Smithing	100	25			32	75			76	25				209	25			42
43—																		43
44—																		44
Total Deductions	756	75		0129	229	25		0155	425	55		0124		1,411	55		0130	
Net Cost of Mining	90,148	51	1	5386	24,414	05	1	6477	56,932	10	1	6511		171,494	66	1	5896	

Cost, Production and Disposition DECEMBER 192 7.

PRODUCTION AND COST	TONS	COST	
		Amount	Per Ton
Howard Collieries	58,591.00	90,148.51	1.5386
Vulcan Colliery	14,816.73	24,414.05	1.6477
Pond Creek Colliery	34,481.00	56,932.10	1.6511
All Collieries	107,888.73	171,494.66	1.5896

DISPOSITION	
	Mine Run
Norfolk and Western Ry. Co. from Howard Collieries	10,422.25
Norfolk and Western Ry. Co. from Vulcan Colliery	4,763.05
Norfolk and Western Ry. Co. from Pond Creek Colliery	4,784.50
Norfolk and Western Ry. Co. from All Collieries	19,969.80

SUMMARY

MONTH	HOWARD COLLIERIES			VULCAN COLLIERY			POND CREEK COLLIERY			
	Tons Mined	Cost Per Ton	Tons Mined Last Year	Tons Mined	Cost Per Ton	Tons Mined Last Year	Tons Mined	Cost Per Ton	Tons Mined Last Year	Tons Mined
January	46,542.80	1.7662	40,057.35	12,117.30	1.8850	14,173.27	24,249.00	1.9532	21,962.00	82,909.10
February	42,880.50	1.7954	37,829.95	10,891.46	1.9422	13,659.87	26,021.00	1.8689	20,204.00	79,792.96
March	52,197.30	1.6404	49,527.85	12,915.68	1.7000	16,698.19	32,662.00	1.7965	25,120.00	97,774.98
April	44,540.55	1.6951	51,456.75	14,068.35	1.6618	16,099.84	27,730.00	1.8182	26,965.00	86,338.90
May	48,072.20	1.6521	52,395..5	14,967.65	1.7163	16,295.32	25,224.00	1.8343	26,517.00	88,263.85
June	46,368.00	1.6502	54,039.45	15,215.43	1.6049	16,013.18	24,204.00	1.8793	26,051.00	85,787.43
July	48,321.95	1.6243	52,530.35	15,466.92	1.6270	14,700.47	24,200.00	1.8785	25,877.00	87,988.87
August	54,736.00	1.5641	50,057.30	15,450.76	1.6697	13,754.11	25,847.00	1.8359	25,930.00	96,033.76
September	49,046.90	1.5993	49,035.10	14,702.92	1.6222	13,576.87	27,713.00	1.8089	24,298.00	91,462.82
October	53,945.60	1.5541	49,097.30	14,632.00	1.6723	12,516.36	27,857.00	1.9065	22,437.00	96,464.60

Exhibit 49

Cost, Production and Disposition DECEMBER 192 7.

	COST	
	Amount	Per Ton
.00	90,148.51	1.5386
.73	24,414.05	1.6477
.00	56,932.10	1.6511
.73	171,494.66	1.5896

DISPOSITION	TONS SHIPPED			
	Mine Run	Stoker	To Coaling Station	Total
Norfolk and Western Ry. Co. from Howard Collieries	10,422.25	48,168.75	-	58,591.00
Norfolk and Western Ry. Co. from Vulcan Colliery	4,763.05	-	10,053.68	14,816.73
Norfolk and Western Ry. Co. from Pond Creek Colliery	4,784.50	14,487.90	15,208.60	34,481.00
Norfolk and Western Ry. Co. from All Collieries	19,969.80	62,656.65	25,262.28	107,888.73

SUMMARY

ARD COLLIERIES		VULCAN COLLIERY			POND CREEK COLLIERY			ALL COLLIERIES			
Cost Per Ton	Tons Mined Last Year	Tons Mined	Cost Per Ton	Tons Mined Last Year	Tons Mined	Cost Per Ton	Tons Mined Last Year	Tons Mined	Cost Per Ton	Tons Mined Last Year	Inc. or Dec. Over Last Year's Production
1.7662	40,057.35	12,117.30	1.8850	14,173.27	24,249.00	1.9532	21,962.00	82,909.10	1.8384	76,192.62	I 6,716.48
1.7954	37,829.95	10,891.46	1.9422	13,659.87	26,021.00	1.8689	20,204.00	79,792.96	1.8394	71,693.82	I 8,099.14
1.6404	49,527.85	12,915.68	1.7000	16,698.19	32,662.00	1.7965	25,120.00	97,774.98	1.7068	91,346.04	I 6,428.94
1.6951	51,456.75	14,068.35	1.6618	16,099.84	27,730.00	1.8182	26,965.00	86,338.90	1.7292	94,521.59	D 8,182.69
1.6521	52,395..5	14,967.65	1.7163	16,295.32	25,224.00	1.8343	26,517.00	88,263.65	1.7150	95,208.27	D 6,944.42
1.6502	54,039.45	15,215.43	1.6049	16,013.18	24,204.00	1.8793	26,051.00	85,787.43	1.7068	96,103.63	D 10,316.20
1.6243	52,530.35	15,466.92	1.6270	14,700.47	24,200.00	1.8785	25,877.00	87,988.87	1.6947	93,107.82	D 5,118.95
1.5641	50,057.30	15,450.76	1.6697	13,764.11	25,847.00	1.8359	25,930.00	96,033.76	1.6545	89,751.41	I 6,282.35
1.5993	49,035.10	14,702.92	1.6222	13,576.87	27,713.00	1.8089	24,298.00	91,462.82	1.6665	86,909.97	I 4,552.85

PRODUCTION AND COST	TONS	COST	
		Amount	Per Ton
Howard Collieries	58,591.00	90,148.51	1.5386
Vulcan Colliery	14,816.73	24,414.05	1.6477
Pond Creek Colliery	34,481.00	56,932.10	1.6511
All Collieries	107,888.73	171,494.66	1.5896

DISPOSITION	
	Mine Run
Norfolk and Western Ry. Co. from Howard Collieries	10,422.25
Norfolk and Western Ry. Co. from Vulcan Colliery	4,763.05
Norfolk and Western Ry. Co. from Pond Creek Colliery	4,784.50
Norfolk and Western Ry. Co. from All Collieries	19,969.80

SUMMARY

MONTH	HOWARD COLLIERIES			VULCAN COLLIERY			POND CREEK COLLIERY				
	Tons Mined	Cost Per Ton	Tons Mined Last Year	Tons Mined	Cost Per Ton	Tons Mined Last Year	Tons Mined	Cost Per Ton	Tons Mined Last Year	Tons Mined	
January	46,542.80	1.7662	40,057.35	12,117.30	1.8850	14,173.27	24,249.00	1.9532	21,962.00	82,909.10	1.
February	42,880.50	1.7954	37,829.95	10,891.46	1.9422	13,659.87	26,021.00	1.8689	20,204.00	79,792.96	1.
March	52,197.30	1.6404	49,527.85	12,915.68	1.7000	16,698.19	32,662.00	1.7965	25,120.00	97,774.98	1.
April	44,540.55	1.6951	51,456.75	14,068.35	1.6618	16,099.84	27,730.00	1.8182	26,965.00	86,338.90	1.
May	48,072.20	1.6521	52,395.25	14,967.65	1.7163	16,295.32	25,224.00	1.8343	26,517.00	88,263.85	1.
June	46,368.00	1.6502	54,039.45	15,215.43	1.6049	16,013.18	24,204.00	1.8793	26,051.00	85,787.43	1.
July	48,321.95	1.6243	52,530.35	15,466.92	1.6270	14,700.47	24,200.00	1.8785	25,877.00	87,988.87	1.
August	54,736.00	1.5641	50,057.30	15,450.76	1.6697	13,764.11	25,847.00	1.8359	25,930.00	96,033.76	1.
September	49,046.90	1.5993	49,035.10	14,702.92	1.6222	13,576.87	27,713.00	1.8089	24,298.00	91,462.82	1.
October	53,945.60	1.5541	49,097.30	14,632.00	1.6723	12,516.36	27,887.00	1.9065	22,437.00	96,464.60	1.
November	60,607.85	1.4976	46,432.25	14,578.11	1.7382	13,193.00	33,078.00	1.6875	23,617.00	108,263.96	1.
December	58,591.00	1.5386	46,524.80	14,816.73	1.6477	12,676.36	34,481.00	1.6511	23,758.00	107,888.73	1.
TOTALS	605,850.65	1.6234	578,984.40	169,823.31	1.6987	173,366.84	333,296.00	1.8176	292,736.00	1,108,969.96	1.

Approved:

COST	
Amount	Per Ton
0,148.51	1.5386
6,414.05	1.6477
4,932.10	1.6511
1,494.66	1.5896

DISPOSITION	TONS SHIPPED			
	Mine Run	Stoker	To Coaling Station	Total
Norfolk and Western Ry. Co. from Howard Collieries	10,422.25	48,168.75	-	58,591.00
Norfolk and Western Ry. Co. from Vulcan Colliery	4,763.05	-	10,053.68	14,816.73
Norfolk and Western Ry. Co. from Pond Creek Colliery	4,784.50	14,487.90	15,208.60	34,481.00
Norfolk and Western Ry. Co. from All Collieries	19,969.80	62,656.65	25,262.28	107,888.73

SUMMARY

LLIERIES		VULCAN COLLIERY			POND CREEK COLLIERY			ALL COLLIERIES			
	Tons Mined Last Year	Tons Mined	Cost Per Ton	Tons Mined Last Year	Tons Mined	Cost Per Ton	Tons Mined Last Year	Tons Mined	Cost Per Ton	Tons Mined Last Year	Inc. or Dec. Over Last Year's Production
42	40,057.35	12,117.30	1.8850	14,173.27	24,249.00	1.9532	21,962.00	82,909.10	1.8384	76,192.62	I 6,716.48
84	37,829.95	10,891.46	1.9422	13,659.87	26,021.00	1.8689	20,204.00	79,792.96	1.8394	71,693.82	I 8,099.14
04	49,527.85	12,915.68	1.7000	16,698.19	32,662.00	1.7965	25,120.00	97,774.98	1.7004	91,346.04	I 6,428.94
61	51,456.75	14,068.35	1.6618	16,099.84	27,730.00	1.8182	26,965.00	86,338.90	1.7292	94,521.59	D 8,182.69
31	52,395.05	14,967.65	1.7163	16,295.32	25,224.00	1.8343	26,517.00	88,263.85	1.7150	95,208.27	D 6,944.42
02	54,039.45	15,215.43	1.6049	16,013.18	24,204.00	1.8793	26,051.00	85,787.43	1.7068	96,103.63	D 10,316.20
63	52,530.35	15,466.92	1.6270	14,700.47	24,200.00	1.8785	25,877.00	87,988.87	1.6947	93,107.82	D 5,118.95
41	50,057.30	15,450.76	1.6697	13,764.11	25,847.00	1.8359	25,930.00	96,033.76	1.6543	89,751.41	I 6,282.35
93	49,035.10	14,702.92	1.6222	13,576.87	27,713.00	1.8089	24,298.00	91,462.82	1.6665	86,909.97	I 4,552.85
41	49,097.30	14,632.00	1.6723	12,516.36	27,897.00	1.9065	22,437.00	96,464.60	1.6739	84,050.66	I 12,413.94
76	46,432.25	14,578.11	1.7382	13,193.00	33,078.00	1.6875	23,617.00	108,263.96	1.5880	83,242.25	I 25,021.71
36	46,524.80	14,816.73	1.6477	12,676.36	34,481.00	1.6511	23,758.00	107,888.73	1.5896	82,959.16	I 24,929.57
34	578,984.40	169,823.31	1.6987	173,366.84	333,296.00	1.8176	292,736.00	1,108,969.96	1.6933	1,045,087.24	I 63,882.72

Approved:

George Dunglinson Jr.

Manager Fuel Department

NORFOLK & WESTERN

Investment in Howard Collieries by classifications

1	2	3	4	5	6	7
	Acquisition Cost	December 31 1917	December 31 1918	December 31 1919	December 31 1920	December 31 1921
COAL LANDS						
Mining Rights	$ 900,000.00	$ 900,000.00	$ 900.000.00	$ 900.000.00	$ 900.000.00	$ 900,000.00
Leaseholds						
MINE DEVELOPMENT	224.775.15	228,454.51	214.851.91	214,851.91	202,737.55	203,347.55
MINE PLANT AND EQUIPMENT						
Tipples	70,000.00	77,450.43	81,409.01	81,899.38	48,473.16	48,473.16
" -Tracks	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00
Inclines and Conveyors	33,396.44	36,804.85	46,265.92	49,444.68	49,444.68	52,239.75
Tramroads	47,407.70	47,407.70	49,827.87	61,489.80	61,489.80	61,489.80
Power Plants	13,725.00	13,525.00	7,832.78	7,858.51	7,188.01	7,188.01
Power Substations	10,830.00	10,830.00	10,830.00	10,830.00	10,830.00	10,830.00
Power Lines	5,746.60	5,958.01	6,124.86	6,119.21	6,119.21	6,119.21
Shops	1,380.26	2,515.63	2,812.35	2,806.01	2,806.01	2,805.01
Miscellaneous Structures	50.00	50.00	50.00	50.00	50.00	50.00
Prospecting				799.55	799.55	799.55
Mine Locomotives	15,116.00	40,516.68	52,045.18	57,730.61	57,730.61	57,730.61
Mine Cars	22,355.00	35,062.62	47,603.69	60,609.64	60,609.64	67,881.50
Mining Machines	18,640.00	18,225.08	23,245.28	28,075.60	28,075.60	28,075.60
Mine Fans	2,525.00	2,681.09	3,377.73	4,053.50	4,053.50	4,053.50
Mine Pumps and Pipe Lines	4,081.00	4,808.35	5,238.57	5,695.07	5,697.37	6,597.37
Other Mine Equipment			442.77	684.14	684.14	1,625.47
Live Stock	3,895.00	4,500;00	4,500.00	4,500.00	4,500.00	4,500.00
Other Items	30.35		1.19			30.35
Tenant Houses	66,900.00	111,732 92	161,194.74	171 199.92	171,998.57	173,136.32
Water and Sewerage System	7.584.00	12,375.98	17,362.02	17,910.26	17,560.26	22.593.80
Roads and Walks		8,320.20	10,711.46	10,629.61	10,629.61	10,629.61
Store and Office Buildings	12,000.00	12,000.00	12.000.00	12.000.00	12,000.00	12,000.00
Other Non-Mining Buildings	2,850.00	2,850.00	7,716.38	7,865.95	7,865.95	7,865.95
Other Non-Mining Equipment	4,300.00	6,913.96	7,060.84	7,047.04	8,110,18	15,642.96
Furniture and Fixtures	2,859.41	4,410.11	6,984.87	6,923.24	6,923.24	14,727.56
Engineering Equipment	189.40	544.60	811.72	800.49	800.49	800.49
GROSS CAPITAL INVESTMENT	1,480.665.31	1,698,238.73	1,695,271.09	1,741,873.12	1,698,076.13	1,731,233.13
RESERVE - Depletion		4,813.29	13,487.30	22,227.18	26,359.99	35,074.52
- Depreciation		9.626.88	22.583.29	37.149.76	42,393.63	57,917.86
NET CAPITAL INVESTMENT		1,575,798.86	1,659,200.50	1,681,996.18	1,629,322.51	1,658.840.75

NORFOLK & WESTERN RAILWAY COMPANY

Exhibit 50

...e by classifications shown, as taken from Books of Mining Department

	7	8	9	10	11	12	13	14
...r 31	December 31 1921	December 31 1922	December 31 1923	December 31 1924	December 31 1925	December 31 1926	December 31 1927	September 30 1928
...00.00	$ 900,000.00	$ 900,000.00	$ 900,000.00	$ 900,000.00	$ 900,000.00 250,000.00	$ 900,000.00 250,000.00	$ 900,000.00 250,000.00	$ 900,000.00 250,000.00
...27.55	203,347.55	203,347.55	203,347.55	201,019.35	201,019.35	199,519.35	198,919.35	198,794.35
...73.16	48,473.16	48,473.16	54,960.90	54,960.90	54,960.90	64,774.78	66,300.29	66,669.25
...00.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,298.35	10,298.35	10,298.35
...48.68	52,239.75	55,186.52	85,770.20	85,770.20	86,407.20	87,674.16	87,674.16	87,674.16
...89.80	61,489.80	61,489.80	64,575.64	64,575.64	65,025.64	68,157.97	68,157.97	68,157.97
...88.01	7,188.01	7,188.01	7,188.01	7,188.01	7,188.01	7,188.01	7,188.01	7,188.01
...30.00	10,830.00	10,830.00	10,830.00	10,830.00	11,388.00	11,388.00	13,091.18	13,091.18
...19.21	6,119.21	6,119.21	6,119.21	6,119.21	6,119.21	6,119.21	6,119.21	6,119.21
...08.01	2,805.01	2,806.01	2,805.01	2,455.01	1,901.63	8,263.13	8,463.39	8,463.39
...50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00
...99.55	799.55	2,223.63	3,720.28	3,720.28	3,720.28	3,720.28	3,720.28	3,720.28
...30.61	57,730.61	57,730.61	70,093.61	70,093.61	67,473.39	71,222.19	85,206.19	85,206.19
...89.64	67,881.50	71,170.60	93,836.04	93,836.04	100,385.94	107,585.94	118,922.94	118,922.94
...75.60	28,075.60	28,075.60	35,219.10	35,219.10	35,219.10	35,219.10	38,863.33	38,863.33
...53.50	4,053.50	4,053.50	4,053.50	4,053.50	4,053.50	4,640.30	4,640.30	4,640.30
...97.37	6,597.37	6,597.37	6,597.37	7,671.47	8,096.47	8,606.47	8,606.47	8,606.47
...24.14	1,625.47	1,625.47	1,625.47	1,625.47	1,625.47	1,625.47	2,864.97	2,864.97
...00.00	4,500.00	4,500.00	4,500.00	4,500.00	4,500.00	4,500.00	4,500.00	4,500.00
	30.35	30.35	30.35	30.35	30.35	30.35	30.35	30.35
...98.57	173,136.32	173,700.93	218,709.86	227,184.28	227,937.02	230,850.28	230,850.28	229,757.80
...50.26	22,593.80	23,107.45	21,807.45	21,807.45	21,807.45	21,807.45	21,807.45	21,807.45
...29.61	10,629.61	13,410.15	13,410.15	13,410.15	13,410.15	13,410.15	13,410.15	13,410.15
...00.00	12,000.00	12,000.00	12,000.00	12,000.00	12,000.00	12,000.00	12,000.00	12,000.00
...65.95	7,865.95	7,865.95	865.95	12,868.83	12,868.83	12,868.83	13,402.71	13,402.71
...10.18	15,642.96	15,642.96	17,167.96	16,096.72	16,096.72	16,891.72	17,445.72	17,445.72
...83.24	14,727.56	14,810.86	14,810.86	15,669.27	15,669.27	15,669.27	15,669.27	15,669.27
...00.49	800.49	800.49	800.49	800.49	800.49	800.49	800.49	800.49
...76.13	1,731,283.13	1,742,837.18	1,871,894.96	1,883,455.33	2,139,754.37	2,174,881.25	2,209,002.81	2,208,154.29
...89.99	35,074.52	45,132.45	65,874.80	90,638.18	114,373.79	143,523.01	173,615.54	203,177.15
...93.63	57,917.86	80,644.84	121,644.37	166,284.01	199,957.56	242,788.24	288,227.05	344,682.91
...82.51	1,658,840.75	1,617 059.89	1,684,475.79	1,626,533.14	1,825,423.02	1,788,770.00	1,747,160.22	1,660,294.23

NORFOLK & WESTERN RA

Investment in Vulcan Colliery by Classifications, as

1	2	3	4	5	6	7	
	Acquisition Cost	December 31 1917	December 31 1918	December 31 1919	December 31 1920	December 31 1921	De
COAL LANDS							
MINE DEVELOPMENT	$178,712.48	$166,596.16	$167,896.16	$180,929.49	$180,929.49	$179,712.48	$1
MINE PLANT AND EQUIPMENT							
Tipple	16,497.60	16,611.60	26,749.85	28,364.86	28,364.86	28,384.82	
Tipple Tracks	4,438.89	4,438.89	4,438.89	4,438.89	4,438.89	4,438.89	
Conveyors and Inclines	36,545.06	38,005.58	38,005.58	38,005.58	38,541.54	38,541.54	
Tramroads	10,865.00	10,865.00	17,939.13	17,764.33	18,099.15	29,495.60	
Power Substation	6,143.59	11,463.99	11,463.99	11,463.99	11,463.99	11,463.99	
Power Lines	5,502.60	5,502.60	5,541.96	5,541.76	5,541.76	5,541.76	
Shops	2,825.63	2,825.63	2,825.63	2,825.63	2,825.63	2,825.63	
Miscellaneous Structures	300.00	300.00	300.00	300.00	300.00	300.00	
Mine Locomotives	12,806.00	18,175.91	19,646.11	23,832.39	23,832.39	23,832.39	
Mine Cars	25,563.79	26,171.00	25,659.79	25,659.79	34,490.31	34,080.21	
Mining Machines	13,200.00	13,200.00	13,200.00	13,200.00	13,200.00	13,200.00	
Mine Fans	2,238.50	2,238.50	2,238.50	2,238.50	2,238.50	2,238.50	
Mine Pumps and Pipe Lines	510.00	510.00	1,010.00	1,985.00	1,985.00	1,985.00	
Other Mine Equipment			484.63	891.57	891.57	891.57	
Live Stock	1,200.00	1,500.00	1,437.30	1,415.00	1,415.00	1,415.00	
Tenant Houses	60,013.28	66,659.31	107,604.07	114,793.88	117,975.73	118,613.35	1
Water and Sewerage System	4,818.62	5,712.96	8,707.16	11,488.07	12,366.88	20,199.95	
Roads and Walks	7,210.76	8,716.85	15,391.35	17,763.86	17,763.86	17,763.86	
Store and Office Building	3,400.00	3,400.00	3,400.00	3,400.00	3,400.00	3,400.00	
Other Non-Mining Buildings	7,336.96	7,336.96	7,336.96	7,336.96	7,336.96	7,336.96	
Other Non-Mining Equipment			1,129.90	1,092.14	1,092.14	1,092.14	
Furniture and Fixtures	1,064.36	1,101.23	1,667.95	2,497.80	2,681.23	2,981.23	
GROSS CAPITAL INVESTMENT	$401,193.12	$411,332.17	$483,774.91	$517,229.49	$531,174.88	$549,704.87	$5
RESERVE - DEPRECIATION		7,755.90	20,664.33	41,240.20	51,782.19	70,110.65	
NET CAPITAL INVESTMENT		$403,576.27	$463,110.58	$475,989.29	$479,392.69	$479,594.22	$4

NORFOLK & WESTERN RAILWAY COMPANY

Exhibit 51

...y by Classifications, as taken from Books of Mining Department

	7	8	9	10	11	12	13	14
...er 31 ...0	December 31 1921	December 31 1922	December 31 1923	December 31 1924	December 31 1925	December 31 1926	December 31 1927	September 30 1928
...9.49	$179,712.48	$179,712.48	$179,712.48	$179,712.48	$179,712.48	$179,712.48	$179,712.48	$179,712.48
...4.86	28,384.82	28,384.82	28,384.82	28,384.82	28,384.82	28,384.82	28,384.82	28,384.82
...9.89	4,438.89	4,438.89	4,438.89	4,438.89	4,438.89	4,438.89	4,438.89	4,438.89
...1.54	38,541.54	38,541.54	38,541.54	38,541.54	38,541.54	38,541.54	38,541.54	38,541.54
...9.15	29,495.60	33,546.21	33,546.21	33,546.21	33,546.21	33,546.21	33,546.21	33,546.21
...8.99	11,463.99	11,463.99	11,463.99	11,463.99	11,463.99	11,463.99	11,463.99	11,463.99
...1.76	5,541.76	5,541.76	5,541.76	5,541.76	5,541.76	5,541.76	5,541.76	5,541.76
...5.63	2,825.63	2,825.63	2,825.63	2,825.63	2,825.63	2,825.63	2,825.63	2,825.63
...0.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00
...2.39	23,832.39	27,897.39	27,897.39	27,897.39	27,897.39	27,897.39	27,897.39	27,897.39
...0.21	34,050.21	34,050.21	34,050.21	34,050.21	34,050.21	34,050.21	34,050.21	34,050.21
...0.00	13,200.00	13,200.00	13,200.00	13,200.00	13,200.00	13,200.00	13,200.00	13,200.00
...8.50	2,238.50	2,238.50	2,238.50	2,238.50	2,238.50	2,238.50	2,238.50	2,238.50
...5.00	1,985.00	1,985.00	1,985.00	2,435.00	2,435.00	2,435.00	2,435.00	2,435.00
...1.57	891.57	891.57	891.57	891.57	891.57	891.57	891.57	891.57
...5.00	1,415.00	1,415.00	1,415.00	1,415.00	1,415.00	1,415.00	1,415.00	1,415.00
...6.73	118,613.35	118,613.35	119,063.18	119,063.18	119,063.18	118,863.18	118,862.18	118,863.18
...6.88	20,199.95	20,199.95	20,199.95	20,199.95	20,199.95	20,199.95	20,199.95	20,199.95
...3.86	17,763.86	17,763.86	17,763.86	17,763.86	17,763.86	17,763.86	17,763.86	17,763.86
...0.00	3,400.00	3,400.00	3,400.00	3,400.00	3,400.00	3,400.00	3,400.00	3,400.00
...6.96	7,336.96	7,336.96	7,336.96	7,336.96	7,336.96	7,336.96	7,336.96	7,336.96
...2.14	1,092.14	1,092.14	4,066.20	4,066.20	4,066.20	4,066.20	4,066.20	4,066.20
...1.23	2,981.23	2,981.23	3,473.23	3,473.23	4,123.98	4,123.98	4,123.98	4,123.98
...4.88	$549,704.87	$557,820.48	$561,736.37	$562,186.37	$562,837.12	$562,637.12	$562,637.12	$562,637.12
...2.19	70,110.65	90,639.72	114,056.92	136,158.76	157,775.24	179,446.11	200,674.02	202,282.03
...7.69	$479,594.22	$467,180.76	$447,679.45	$426,027.61	$405,061.88	$383,191.01	$361,963.10	$360,355.09

NORFOLK & WESTERN RAILWAY COMPANY

INVESTMENT IN POND CREEK COLLIERY BY CLASSIFICATIONS SHOWN, AS TAKEN FROM BOOKS OF MINING DEPARTMENT

	2	3	4	5	6	7	8	9
	Acquisition Cost	December 31st, 1921	December 31st, 1922	December 31st, 1923	December 31st, 1924	December 31st, 1925	December 31st, 1926	December 31st, 1927
COAL LANDS								
Leaseholds	$152,670.09	$152,726.89	$152,726.89	$152,726.89	$152,726.89	$152,726.89	$152,726.89	$152,726.89
OTHER REAL ESTATE								
Lots		5,351.50	5,351.50	5,351.50	5,351.50	5,351.50	5,351.50	5,351.50
MINE DEVELOPMENT	44,544.53	57,861.39	59,335.98	62,751.65	62,751.65	62,751.65	62,751.65	62,751.65
MINE PLANT AND EQUIPMENT								
Tipple and Conveyors	31,494.05	108,689.85	145,058.27	160,281.33	160,281.33	161,952.35	161,952.35	162,997.62
Tipple Tracks	11,313.29	11,313.29	11,313.29	11,313.29	11,313.29	11,313.29	11,313.29	11,313.29
Inclines	3,797.00	9,546.11	11,210.40	11,210.40	11,210.40	11,210.40	11,210.40	11,210.40
Tramroads	15,147.56	36,788.74	41,872.91	41,872.91	41,872.91	41,872.91	41,872.91	41,872.91
Power Substations	5,217.63	5,217.63	5,217.63	11,930.32	11,930.32	12,280.84	12,280.84	19,710.75
Power Lines		8,777.92	8,752.47	8,752.47	5,752.47	8,752.47	8,752.47	10,989.14
Shops		196.18	5,530.96	5,530.96	5,530.96	5,530.96	6,018.77	9,469.83
Miscellaneous Structures		947.38	947.38	947.38	947.38	947.38	947.38	947.38
Prospecting		744.05	753.39	787.39	787.39	787.39	787.39	787.39
Mine Locomotives	9,647.71	18,956.19	23,422.54	30,445.25	30,445.25	34,848.25	42,978.96	52,543.84
Mine Cars	8,472.29	25,217.83	34,839.96	48,912.49	48,912.49	48,912.49	51,114.44	89,737.42
Mining Machines	6,800.00	14,060.00	17,631.77	25,229.99	25,229.99	25,229.99	32,626.23	82,626.23
Mine Fans	1,859.13	3,871.61	3,871.61	3,871.61	3,871.61	4,188.15	4,188.15	4,188.15
Mine Pumps and Pipe Lines			941.50	2,382.50	2,382.50	2,382.50	2,732.50	2,732.50
Other Mine Equipment	1,823.25	1,823.25	1,823.25	1,823.25	2,043.75	2,043.75	4,491.88	4,491.88
Tenant Houses	21,898.75	128,314.80	151,372.05	184,797.23	190,822.11	190,822.11	190,822.11	190,822.11
Water and Sewerage System	1,539.35	16,217.63	17,636.37	18,946.68	18,946.68	18,946.68	18,946.68	18,946.68
Roads and Walks	1,561.50	19,483.88	18,207.42	18,207.42	18,207.42	18,207.42	18,207.42	18,207.42
Store and Office Buildings	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00
Other Non-Mining Buildings	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00
Other non-Mining Equipment	8,732.81	8,732.81	8,732.81	9,392.81	9,392.81	9,392.81	10,257.81	10,257.81
Furniture and Fixtures	1,327.28	1,595.65	2,443.31	2,443.31	2,443.31	2,443.31	3,859.31	3,859.31
Engineering Equipment					223.50	223.50	223.50	223.50
GROSS CAPITAL INVESTMENT	$329,546.22	$639,223.04	$731,013.67	$821,749.03	$827,917.91	$834,633.99	$867,914.85	$890,245.22
RESERVE - DEPRECIATION		13,351.35	35,412.59	67,804.23	106,029.27	141,013.06	177,605.08	219,847.11
NET CAPITAL INVESTMENT		$625,871.69	$695,601.08	$753,944.80	$721,888.64	$693,620.93	$690,309.77	$670,398.11

Exhibit 62

NORFOLK & WESTERN RAILWAY COMPANY

INVESTMENT IN POND CREEK COLLIERY BY CLASSIFICATIONS SHOWN, AS TAKEN FROM BOOKS OF MINING DEPARTMENT

	2	3	4	5	6	7	8	9	10
	Acquisition Cost	December 31st, 1921	December 31st, 1922	December 31st, 1923	December 31st, 1924	December 31st, 1925	December 31st, 1926	December 31st, 1927	September 30th, 1928
	$152,670.09	$152,726.89	$152,726.89	$152,726.89	$152.726.89	$152,726.89	$152,726.89	$152,726.89	$152,726.89
ATE		5,351.50	5,351.50	5,351.50	5,351.50	5,351.50	5,351.50	5,351.50	5,351.50
ENT	44,544.53	57,861.39	59,335.98	62,751.65	62,751.65	62,751.65	62,751.65	62,751.65	62,751.65
EQUIPMENT									
Conveyors	31,694.05	108,489.83	145,058.27	160,281.33	160,281.33	161,952.35	161,952.35	162,997.42	162,997.42
ks	11,313.29	11,313.29	11,313.29	11,313.29	11,313.29	11,313.29	11,313.29	11,313.29	11,313.29
	3,797.00	9,546.11	11,210.40	11,210.40	11,210.40	11,210.40	11,210.40	11,210.40	11,210.40
	15,147.56	36,788.74	41,872.91	41,872.91	41,872.91	41,872.91	41,872.91	41,872.91	41,872.91
tations	5,217.63	5,217.63	5,217.63	11,930.32	11,930.32	12,280.84	12,280.84	19,710.75	19,710.75
		6,777.92	6,752.47	6,752.47	6,752.47	6,752.47	6,752.47	10,989.14	10,989.14	
		196.16	5,530.96	5,530.96	5,530.96	5,530.96	6,018.77	9,469.83	9,469.83
us Structures		947.38	947.38	947.38	947.38	947.38	947.38	947.38	947.38
		744.05	753.39	787.39	787.39	787.39	787.39	787.39	787.39
tives	9,647.71	18,956.19	23,422.56	30,445.25	30,445.25	34,845.25	42,978.96	52,543.06	52,543.06
	8,472.29	26,217.83	34,839.96	48,912.49	48,912.49	48,912.49	51,114.46	59,737.62	59,737.62
ines	6,860.00	14,060.00	17,631.77	25,229.99	25,229.99	25,229.99	32,626.23	82,626.23	82,626.23
	1,559.13	3,871.61	3,871.61	3,871.61	3,871.61	4,188.15	4,188.15	4,188.15	4,188.15
and Pipe Lines			941.50	2,382.50	2,382.50	2,382.50	2,732.50	2,732.50	2,732.50
Equipment	1,823.25	1,823.25	1,823.25	1,823.25	2,043.75	2,043.75	4,491.88	4,491.88	4,491.88
es	21,898.75	128,314.50	151,372.05	184,797.23	190,522.11	190,522.11	190,522.11	190,522.11	190,522.11
ewerage System	1,539.35	16,217.63	17,636.37	18,946.68	18,946.68	18,946.68	18,946.68	18,946.68	18,946.68
alks	1,561.50	19,483.88	18,207.42	18,207.42	18,207.42	18,207.42	18,207.42	18,237.42	18,207.42
ffice Buildings	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00
ining Buildings	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00	300.00
ining Equipment	8,732.81	8,732.81	8,732.81	9,392.81	9,392.81	9,392.81	10,257.81	10,257.81	10,257.81
nd Fixtures Equipment	1,327.28	1,595.65	2,463.31	2,463.31	2,463.31 223.50	2,463.31 223.50	3,859.31 223.50	3,859.31 223.50	3,859.31 223.50
INVESTMENT	$329,546.22	$639,223.04	$731,013.67	$821,749.03	$827,917.91	$834,635.99	$857,914.85	$890,248.22	$890,248.22
CIATION		13,351.35	35,412.59	67,804.23	106,029.27	141,015.08	177,605.08	219,367.11	280,527.26
VESTMENT		$625,871.69	$695,601.08	$753,944.80	$721,888.64	$693,620.93	$680,309.77	$670,978.11	$609,717.96

NORFOLK AND WESTERN RAILWAY COMPANY

Detailed Statement of Miscellaneous Income from Mining Property Operations for

1927 Month	HOWARD COLLIERIES Leased Rentals	Mine Checks	Miners Insurance	Rent	+Store	Unclaimed Wages	Total	VULCAN COLLIERY Mine Checks	Miners Insurance	Rent	+Store	Unclaimed Wages
January		13.30	89.26	476.10		141.40		4.60	18.24	171.06		15.43
February	20.00	7.15	98.78	520.08		180.73		4.50	19.97	185.76		13.44
March		19.30	88.53	218.12		88.65		13.30	22.22	243.23		20.03
April		16.70	90.53	130.85		22.96		4.40	22.52	133.80		6.44
May		19.78	93.37	112.88		4.57		7.30	24.69	183.13		14.52
June		17.88	92.38	231.36		74.78		5.10	24.99	116.99		1.95
July		24.80	72.59	427.13		136.07		7.00	20.34	276.83		7.53
August		14.35	82.45	611.67		95.24		6.94	23.50	167.72		5.15
September		27.12	85.75	752.80		57.01		3.70	22.00	88.40		11.99
October		23.50	80.75	462.86		41.40		17.81	27.25	125.09		3.62
November		31.18	82.00	94.01		100.02		4.18	28.00	204.17		6.80
December		20.05	44.00	967.27	49551.01	236.23		6.10	25.25	9.75	11840.46	7.92
TOTAL	$ 20.00	$ 235.11	$ 897.39	$ 2451.72	$ 49551.01	$1133.14	$ 54288.37	$ 84.93	$ 278.97	$ 695.75	$ 11840.46	$ 106.52

SUMMARY

1927 Month	Leased Rentals	Mine Checks	Miners Insurance	Rent	+
January		67.00	132.81	154.43	
February	20.00	36.83	141.36	1,119.20	
March		32.88	137.12	551.72	
April		43.42	147.68	289.07	
May		45.06	152.97	553.89	
June		48.88	146.18	759.92	
July		58.04	119.94	704.29	
August		42.23	126.70	1,220.14	
September		44.02	132.75	716.49	
October		96.45	139.25	320.19	
November		89.98	136.00	271.17	
December		55.95	123.80	1,488.34	76.
TOTAL	$ 20.00	$ 639.72	$ 1,656.86	$ 4,248.51	$ 76.

+ Profit from Stores is arrived at from Inventory of Stock as of December 31,

NORFOLK AND WESTERN RAILWAY COMPANY

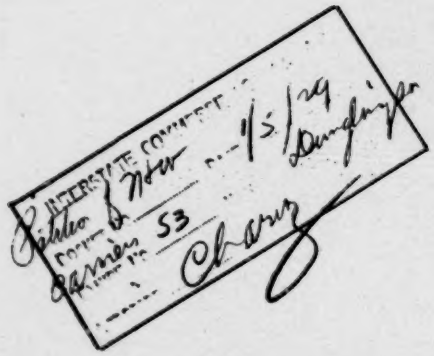
Exhibit 53

Miscellaneous Income from Mining Property Operations for Year Ended December 31, 1927.

	VULCAN COLLIERY					POND CREEK COLLIERY					
ine ecks	Miners Insurance	Rent	+Store	Unclaimed Wages	Total	Mine Checks	Miners Insurance	Rent	+Store	Unclaimed Wages	Total
.60	18.24	171.06		15.43		49.10	25.31	439.47		42.71	
.50	19.97	185.76		13.44		27.18	25.61	413.36		36.34	
.30	22.22	243.23		20.03		.28	26.37	70.37		20.10	
.40	22.52	133.80		6.44		22.32	34.65	256.12		19.29	
.30	24.69	183.15		14.52		17.98	34.91	624.14		12.53	
.10	24.99	116.99		1.95		25.90	28.81	1108.26		43.30	
.00	20.34	276.83		7.53		26.24	27.01	553.99		26.04	
.94	23.50	167.72		3.15		20.94	50.75	440.75		25.26	
.70	22.00	88.40		11.99		13.20	45.00	124.71		63.79	
.81	27.25	125.09		3.62		55.12	51.25	267.76		8.78	
.18	28.00	204.17		6.80		33.62	56.00	27.01		28.23	
.10	25.25	9.75	11840.45	7.92		27.80	54.25	491.32	15516.97	24.37	
.93	$ 278.97	$ 695.75	$ 11840.46	$ 106.52	$ 13004.63	$ 319.68	$ 489.90	$ 1103.04	$ 15516.97	$ 254.40	$ 17653.99

SUMMARY

Mine Checks	Miners Insurance	Rent	+Store	Unclaimed Wages	TOTAL
67.00	132.81	134.43		199.54	
36.83	141.36	1,119.20		230.51	
32.88	137.12	531.72		88.58	
43.42	147.68	289.07		35.81	
45.06	152.97	553.89		31.62	
48.88	146.18	759.92		120.03	
58.04	119.94	704.29		169.64	
43.23	126.70	1,220.14		117.35	
44.02	132.76	716.49		132.79	
96.45	139.25	320.19		36.24	
89.96	136.00	271.17		135.05	
85.95	123.80	1,448.34	76,908.44	268.52	
$ 630.72	$ 1,656.26	$ 8,448.51	$ 76,908.44	$ 1,494.06	$ 84,946.99



is arrived at from Inventory of Stock as of December 31, Compared with the Inventory at the Previous Date.

Office of the Comptroller,
Norfolk & Western Ry. Co.,
Roanoke, Virginia.
December 27, 1928.

Exhibit 48 consists of one sheet headed "Details of Mining Cost December, 1927."

Exhibit 49 consists of one sheet and is headed "Cost, production and disposition, December, 1927."

Exhibit 50 is a blue print statement entitled "Norfolk & Western Railway Company Investment in Howard Collieries by classification" shown as taken from the books of the mining department of the Norfolk & Western Railway Company.

[fol. 123] Exhibit 51 is a blue print statement entitled "Norfolk & Western Railway Company Investment in Vulcan Colliery" as taken from books of mining department.

Exhibit 52 is a blue print statement entitled "Norfolk & Western Railway Company Investment in Pond Creek Colliery by classification" shown as taken from books of mining department.

In connection with these last three Exhibits, there is no compelling necessity for any breakdown of the investment in these properties, but for the convenience and information of the management of the department and the officers of the company a breakdown was made as indicated on these statements.

Exhibit 53 is a statement prepared in the office of the Comptroller from basic information furnished by me. It correctly shows the miscellaneous income or operating credits from the mining department for the year ending December 31, 1927.

Cross-examination:

The Howard Collieries are located in Mingo County, West Virginia on a short spur track connecting with the main line at Chattaroy, West Virginia, the spur line being a mile and half or two miles long. The total present acreage involved in the Howard Collieries is approximately 5350 acres, all coal land. On this property—three seams, the Winifred, Coalburg and Freeport are being worked in addition to the Thacker and Pond Creek seams, which are not being worked. The three seams which are being worked do not underlie the entire property. The outcrop of all seams that are being worked are indicated on the map ex-
[fol. 124] hibits. In the original boundary the railway com-

pany has the mining rights on all seams; on the additional lease of January 1, 1924, with the Sycamore Coal Company, we have under lease the Coalburg seam only.

Under the additional lease of May 25, 1925 with the Cotiga Development Company, we have leasehold rights on the Winifred and overlying seams being the Coalburg and Freeport. The leases introduced speak for themselves on that point. The part of the map marked "original purchase" on the key map of Exhibit No. 1 shows land in which the Howard Collieries own all of the underlying coal seams and all other minerals. The fee simple title to the lands in the original Howard purchase is held by the Pocahontas Coal Company which is a subsidiary company of the Norfolk & Western Railway Company. This is the only land the fee title to which was acquired by the carrier or a subsidiary company. The fee title to the Cotiga property is in the Cotiga Development Company, which is not associated in any way with the carrier. I do not know who owns the fee title to the Sycamore lands, but it is not owned by any subsidiary company of the carrier.

The Pocahontas Coal & Coke Company paid $2,875.00 for the fee title to the 2,875 acres of the original Howard purchase. This amount was paid by the Pocahontas Company to the railroad and reduced acquisition cost by that amount. That amount is, therefore, not included in the acquisition or in any other item set out in Exhibit 50.

I stated that the original Howard purchase of 2,875 acres was free of royalty and rentals which means that all royalties and rentals for the use of the land and in removing minerals had been anticipated except the payment of $30.00 per annum and the taxes.

[fol. 125] The prepaid royalties are represented as acquisition costs in our breakdown to which we assigned $900,000.00 as the value of the mineral rights and mining rights. That is our analysis of such value. In this property we acquired also gas and oil rights, but no part of the $900,000.00 applies to either oil or gas rights, as we do not consider that such rights have any value since no producing gas or oil well having any commercial value is located in that region. While I am not prepared to say positively that there is no oil or gas in that immediate section, none has ever been produced in that neighborhood, and it is my opinion that there is no value in any other mineral rights

on this property with the exception of coal. The $900,000.00 represents our analysis of the allocation of that part of the acquisition cost applicable to the mining rights and privileges. This figure was arrived at after giving the property careful consideration and I concluded that for our purposes it would be proper to place a value of $900,000.00 as representative of the mineral and mining rights obtained in this purchase giving consideration to the estimate of the total tonnage of coal in the purchase.

It was not arrived at by an appraisal of the various items, such as tipples, locomotives, cars, and so on, and subtracting that figure from the total cost of $1,480,665.31.

Of the 18,650,000 tons estimated as of the date of purchase, the part estimated in each seam is as follows:

250 acres of Freeport seam, average thickness 5 feet; 1,750,000 tons;

650 acres of Coalburg seam, average thickness 5 feet, 8 inches 5,150,000 tons;

500 acres of Winifred seam, average thickness 5 feet 3 inches, 3,650,000 tons;

[fol. 126] 1,500 acres of Thacker seam, average thickness 3 ft. 10 inches 8,100,000 tons.

This estimate does not include tonnage confidently expected in one or more seams, the prospecting of which has not yet been completed. Due weight was given to this fact in determining the $900,000.00 allocation to mining rights, but no definite tonnage was assigned to these seams not yet prospected. No particular part of the $900,000.00 applied to the additional possible coal. That figure represented our opinion of the value of the mineral and mining rights assuming the presence of 18,600,000 tons of available coal with possibly and probably additional coal from other seams.

The Cotiga lease dated May 25, 1925 for the cancellation of a prior lease on which land the carrier paid $250,000.00 did not contain the same terms as the lease which was cancelled, but my recollection is that the terms of the new lease were more favorable to the lessee. Under this lease the carrier pays a royalty of twenty cents per ton, with the condition that if the purchase price of fuel coal from the mines in that neighborhood shall exceed $2.00 per ton then the royalties shall be increased by an amount equal to 10% of such increase. That lease is Exhibit No. 13 and applies to the property marked on the map as "Cotiga Develop-

ment Corporation" or the "Cotiga Leasehold". The $250,000.00 represents our opinion as to the value of the leasehold to our properties. It is no part of the consideration paid or payable to the lessor. By our opinion, I meant my personal opinion.

I could not, without an investigation and check-up determine what percentage of the coal originally considered to be available still remains in the ground. No mining has [fol. 127] been done in the Thacker or the Pond Creek seams in the original purchase. We have made no estimate of the coal in the Pond Creek seam and no completed plans have been made for the mining of either of these seams, that is on the original purchase and we have no mining rights in these two latter seams in the additional leases.

The item $224,000.00 plus, in the second line of Exhibit 50 represents our opinion as to the part of the acquisition costs which should be assigned to the value of mine workings, entries, openings, working places and rooms which permit of the immediate output of a substantial tonnage of coal. (By our, I mean my personal opinion, in which I feel that my superior officers concur.)

This allocation to mining rights, etc. was made after the purchase of the property and I was seeking to break down the purchase cost for my own convenience in managing the mines and naturally I made the sum total of the various items equal the total acquisition cost. I could not give the order in which I took up these various items and appraised them. This breakdown is not fixed definitely to the last penny. It is just a breakdown that suits our convenience and purpose. Naturally, I assumed values that I thought were correct in making that breakdown and values that were applicable to the classifications named. In arriving at my figures, I did not necessarily apply to each factor a definite figure. I had mine maps of the property and was familiar therewith. Some of the accounts in certain ways do represent the difference in certain additions and subtractions but that does not detract from my opinion as to the value allocated to these various items.

There was no part of the original purchase price of the Howard properties applied to the cancellation of outstand- [fol. 128] ing leases by the railway company.

The second figure column in Exhibit 50 headed December 31, 1917, and each successive column headed December 31

for the successive years down to column headed September 30, 1928 is a cumulative statement, i. e., additions are added and retirements are subtracted. The difference between $224,000.00 plus in column 2 and $228,000.00 plus in column 3, probably represented some cash outlay or it probably represented some increase in the way of mine development. A part of the successive reductions in columns was brought about by encroachments by neighboring mines into our property and by release by us of mining rights on a small tract of land, which causes a reduction in this particular item. By encroachments, I mean that adjoining property owners crossing over our boundary line took some coal from us for which we were reimbursed and these credits were applied partly to Capital account and partly to depletion. Credits on account of coal removed by the company are shown in our depletion account.

We made no annual estimate of the coal on hand but subtracted that produced from our original estimate.

The item gross capital invested at the foot of column 2, Exhibit 50 refers to the original purchase and as other lands were added they are shown under proper years in appropriate columns as set out in the final column of Exhibit 50. Column 14 of this Exhibit is a summarization of all of the investment items up to September 30, 1928 by classification as shown, and the last item of $1,660,394.23 represents the gross cost of the property plus additions and improvements since the date of purchase, less retirements of capital items after giving due weight to credits set aside as depletion and depreciation reserves, and also includes the item of $250,000.00 which was paid for cancellation of lease on the Cotiga leasehold.

In Exhibit 1 the pink coloring shows the amount of mine [fol. 129] working and the improvements and boundary lines at the time of the acquisition of the property. The yellow coloring shows the same subsequent to the date of acquisition. The same color scheme of pink and yellow carries through, as to mine workings, boundary lines and physical improvements.

The output of the Howard mines increased up to the year 1928, which year was greatly in excess of any previous year, and is the largest rate of production we have had. The mine development has increased to some extent from year to year.

In Exhibit 50, the mine development shown in column 14

for September, 1928, is substantially less than the mine development at the time of acquisition for the reason that good mining practice prescribes that after a mine has reached what may be termed its normal rate of production or a reasonable rate of production then further extensions from time to time as may be necessary to keep up the output and maintain it with reasonable increase therein, are operating items rather than plant investment items. The reductions in mine development as shown in column 14 as compared with column 2 of said Exhibit 50 are not due to depreciation, although there is an element of depreciation in mine development.

There were some credits to this item in the earlier years due to encroachments, as has been explained before, but this did not account for all of the reduction. I cannot now give all of the details thereof. There is no reduction in the mining rights allocation items of $900,000.00, but there is a depletion of this item due to the mining of coal amounting to $203,000.00 plus. The depreciation item of $344,000.00 plus applies to all other items other than coal lands, mining rights and leaseholds. Depreciation does apply to mine developments.

[fol. 130] There are no depreciation or depletion items which affect any of the figures with the exception of the second and third lines from the bottom of the tabulation. All of the depletion and depreciation items are listed under the classification of reserve depletion and depreciation. In other words, none of these items go into the top part of this statement.

The reduction in amount of approximately $26,000.00 from column 2 to column 14 is a credit to the capital item "Mine Development" but that is entirely separate and distinct from the depletion charge the item of $344,000.00 near the bottom of column 14 in which is charged an element of depreciation and the above depletion figure. Depletion would not operate against mine development.

There is nothing in the record that will show what part of the final figure in Exhibit 50 of $660,394.23 is applied to that part of the Howard Collieries where the coal is owned, that is on the 2875 acres of prepaid royalty coal. In the first two items in column 14 the total charges to coal lands are $1,150,000.00 and the total credits to depletion reserve of $203,177.15. The difference between these two items indi-

cates our breakdown of the investment in coal lands and mining rights yet remaining as of September 30, 1928.

The only coal at the Howard Collieries upon which royalties have been paid is in the 2875 acres.

In Exhibit 51 the top line headed "Coal lands" is left blank for the reason that we own no real estate there. It is entirely a leased proposition. Our leases cover only coal and the incidental items of the use of the surface and timber, etc., in the mining of coal. I do not recall as to our rights in oil and other items.

The leaseholds of the Vulcan Colliery aggregate approximately 900 acres in original leases and an additional lease of 30 acres of adjoining coal land acquired March 2, 1923. [fol. 131] We have additional leasehold rights on approximately 40 or 50 acres of surface land. There was no part of the consideration allotted to other non-mining buildings and non-mining equipment shown in column 2 of Exhibit 51. The surface leases really have no value except that of utility for plant purposes and it is not customary to put values on items of that kind. I am not certain without refreshing my memory by reading the leases, but I think the annual payment for the use of surface land is $25.00 per annum.

The last figures in column 14 of Exhibit 51, $360,355.09 represents the net capital investment in the Vulcan Colliery as of September 30, 1928, and it does not include any items that are not used in connection with the mining operations. The item "other non-mining buildings" listed at something over $7,000.00 includes my estimate made at the time of purchase of the value of the buildings not used in the mining and production of coal, but used in connection with the operation as a whole, such as stable buildings, supply houses, feed houses and incidental buildings of that kind necessary in the operation of mines, but not part of the coal in its handling from the face to the tipple, that are used and useful in connection with mining operations. The term "non-mining" simply means that it is not a part of the plant at the mine itself where coal is produced and in its journey from the working face to the tipple. The Vulcan Colliery is about 20 or 25 miles from the Howard Collieries and is located partly in Mingo County, West Virginia and partly in Pike County, Kentucky. The Vulcan property is located directly on the main line and is not served by a spur. The loading

tipple is, you might say, a side track off the main line and the coal is delivered direct from the mines into the coaling station.

[fol. 132] Referring to Exhibit 52, the Pond Creek Colliery was acquired December 31, 1920 at the purchase price of $329,000.00 plus. All the capital stock of the Pond Creek By-Products Coal Company was purchased for $300,000.00 and in the short interval of time between that stock purchase and the transfer to the carrier some twenty-nine or thirty thousand dollars were expended for plant improvements for which the carrier paid, making the total purchase price $329,546.22.

In column 1, Exhibit 52 is listed "other real estate" and following that in subsequent columns $5,351.50. This item represented the purchase price of six lots which, on account of outside ownership it was felt desirable should be purchased. This amount was not an expenditure for coal lands. The coal itself in this colliery is all under leaseholds and the carrier pays a royalty of so much per ton.

The item "Mine development" as it applies to Exhibits 51 and 52 constitute the same items as in that connection under Exhibit 50.

Referring to Exhibit 4, the first item in column 2, $1,517,000.00 plus, being the acquisition cost of the Howard Collieries is reduced in column 2 by $37,000.00 plus, designated as "operating items". This item represents inventories of merchandise, supplies and other small items not properly chargeable to capital. Therefore, such items were not set up in capital or plant accounts. Then following up different columns after such elimination the investment in capital account for the Howard Collieries is $1,480,000.00 plus, shown in column 3; for the Vulcan Colliery $401,000.00 plus, shown in column 5; and for the Pond Creek Colliery $329,000.00 shown in column 7. The eliminations from the total purchase prices paid for the three different collieries are of the same general character.

In column 1, the general title "Cost of Additions and Improvements" and that sum in the case of the Howard Collieries is shown in column 2 as $825,000.00 plus, which [fol. 133] represents costs of improvements and additions and large items, of which are houses, mine cars, locomotives, cutting machines and things of that nature, including also the $250,000.00 paid for the extension (extinguish-

ment) of a lease in the Cotiga leasehold. The total deduction from the total of $98,000.00 plus represents retir-ment of plant items, such as a house destroyed by fire. One large item was a retirement due to the destruction of one of our coal tipples by fire, and others being retirements due to sale of small pieces of machinery or something of that nature. From the time of the original Howard purchase to September 30, 1928, the total added to this property including equipment, houses and other structures and the Cotiga lease extinguishment, less what was destroyed, was $727,000.00 plus.

In column 4, $162,000.00 plus shows additions and improvements in the way of additional houses and equipment (more or less itemized on Exhibits 50, 51 and 52). Approximately $59,000.00 was for tenant houses rented by miners. It is essential in order to secure and hold a requisite and competent number of mine employees to have such houses, practically all lands throughout the mining sections being owned or leased by mining companies. Therefore, it is the necessary custom to provide on the premises a sufficient number of houses to take care of the labor needs. This same situation exists at all three of the collieries.

In Exhibit 53 is shown income from rent which is derived entirely from houses owned by the company and rented to miners at all three collieries. The mining department keeps an individual record of these operating and capital items which are not entered on the railroad books in detail, but only in total items or in condensed form. The [fol. 134] detail of books are kept by the mining department which carries a separate statement of mine accounting entirely independent of railroad accounts. As far as it is necessary to transfer the mine accounts into railroad accounts, that is accomplished by putting the total or condensed figures into the necessary account in the railroad books. I cannot give the exact procedure. The net results of our mining account is ultimately absorbed into the railroad books.

Exhibit 53 shows the incidental items of miscellaneous income or operating credits accruing during and from the operation of the mining department. Column 1 is self-explanatory. The item of $20.00 in column 21 under "leased rentals" is for a tract of land rented to some party living in the vicinity of the mines for the rental of which we col-

lected this amount. In column 3 "mine checks"—metal discs are sold to the miners at ten cents each for the purpose of identifying the loadings of the mine cars, and when they leave the employ of the company, these checks are turned back and the total income of $235.11 represents profits from the sale of these discs.

Column 4 "Miner's Insurance" is a commission totalling $897.39 which the company received for the collection of premiums on insurance carried by the miners. The amount of the premiums is deducted from the salaries of the miners.

Column 5 "Rent" is the amount received for the rent of tenant houses to miners, less the amounts which the company pays for insurance, taxes, repairs, etc. Some months this account shows a loss, which is due to the fact that taxes, insurance or repairs exceeded for that month the income from rent. The rent account for the Howard Collieries for the year 1927 resulted in a net earning of $2451.72, after the deduction of losses and reasonable charges. There are very few items of unpaid rent due to the fact that it is usually taken out of wages before any [fol. 135] loss occurs. Rent which is not collected is not credited to this account, and there would be no net item because of vacancy of a house. The taxes on the houses are kept separate for the reason that in West Virginia as well as in Kentucky, houses are assessed as one item, equipment as another and leaseholds or land as still another.

Column "6" "Store" shows a profit of $49,551.01 which is the net profit resulting from sales of merchandise in the company store operated for the convenience of the employees. The foot note "Profit from stores is arrived at from inventory of stock as of December, 1931 compared with the inventory at the previous date" was put there, I presume, for the purpose of indicating why the stock profits had not been distributed over the various months of the year. The inventory is taken at the end of each year and before profits can be arrivee at it is necessary to take the inventory. The difference in inventory is reflected in the profit column, if there is a profit. The cost of personnel engaged in the operation of the stores is calculated prior to arriving at the profits.

Column 7 "Unclaimed Wages" is an item of wages earned, but not called for. Column 8 is the total of columns 2 to 7.

The explanation of the various columns 2 to 8 applying to the Howard Collieries is substantially the same as the explanation would be as to columns 9 to 14 with regard to the Vulcan Collieries and columns 14 to 20 as to the Pond Creek Colliery. Columns 21 to 28 summarize or total the figures shown in the three separate Colliery Schedules.

The profit of $84,946.99 in column 28 contributed to a reduction of the cost of coal produced. It is not shown on the Norfolk & Western corporate books and I have not used it in my Exhibit 5, which shows a saving resulting from the operation of the mining department.

Column 1 in Exhibit 5 needs no explanation. Column 2 is the actual tons produced by months from the Norfolk & Western mines. Column 3 represents the per ton cost of the coal produced. The per ton cost representing all op- [fol. 136] erating costs, less operating credits. Operating credits go to reduce the actual per ton cost and are reflected in the mining department books before reaching the Norfolk & Western Corporate books.

Going back to Exhibit 51, column 2, the figure at the top—leaseholds $152,670.09 represents the difference between my estimate of the physical value of mine plant and equipment and mine development and the total acquisition costs. This breakdown of acquisition cost was not necessary, but was done at the time of purchase for our own interest and information and it was not intended that it would ever be subject either to attack or defense. This latter figure represents as I see it, the value to the railway company of the property and the mining privileges due to some extent to its location and desirability from a railroad standpoint.

I am a mining engineer of at least several years' experience and with my particular knowledge of the Pond Creek properties, I took up the item of mine development and all subesquent items appearing in column 2, Exhibit 53 and set down what I regarded as a fair appraisal of their value for the purposes involved and any purposes at the time. When I had so appraised all the items, I subtracted their total from the amount of money paid to the earlier Pond Creek organization and the remainder of $152,670.00 I ascribed to leasehold values.

The consideration paid for the Pond Creek Colliery involved no prepaid royalties and the fee to no coal lands. The Pond Creek By-Products Company was not a subsidiary

of the railway company and there was no relationship between the two. I do not know what was paid by the Pond Creek Company for the leases they held. The sum of $152,000.00 plus, represents no physical property, but only the value to the company of the right to take coal.

[fol. 137] (Petitioner objected to the question calling for the following statement on the ground that it called for a conclusion of law which the witness was not qualified to answer; that a lease is a chattel real. The objection was overruled and an exception duly taken.)

This item is somewhat of the nature of the $250,000.00 paid for the extinguishment of a prior lease on the Cotiga leasehold. It is my opinion that the Pond Creek Lease and similarly the acquisition of the Cotiga lease are valuable.

In Exhibit 48 there are nine columns numbered from 1 to 9. Columns 3, 5, and 7 show the cost per ton at the three Collieries and column 9 is the average cost for the total production. The bottom figure in column 9, less the per ton credit, for miscellaneous operating income are the same as the figures in column 3 of Exhibit 5.

In Exhibit 48 the net cost per ton for all the collieries for the month of December, 1927 is 1.5896, whereas in Exhibit 5 for the year 1927 the cost per ton is shown to be 1.6198. This difference is accounted for by subtracting from the larger figure the item developed in Exhibit 53 and bearing in mind that Exhibit 48 is only for the month of December, whereas, the larger figure is the average for the year 1927. In developing this cost, as shown by Exhibit 48 the item headed "Payroll General" includes the salaries of Superintendent, office force, engineering department and stable attendants. This item includes all employees connected with the mining operation except my salary and that of my secretary. My time is not devoted mainly or largely to the affairs of these collieries, but a number of other duties are from time to time assigned to me, which take up the larger part of my time. The salaries of all employees under me other than my own secretary are included therein, so far as they pertain to the mining department.

Exhibit 6 is made up of four columns, the last column of which shows the percentage of company coal produced from [fol. 138] the three collieries as it relates to the year 1927 (1917), and each year including the first nine months of

1928. The percentage of company-produced coal increased from year to year with one or two minor exceptions. The increase is due to greater production of the mines and not to less consumption by the railroad, the total requirements during the eleven-year period being about the same.

It would be impossible to segregate accurately the cost of producing coal in the original Howard purchase area of 2875 acres as compared with the cost of producing coal on the later acquired leasehold properties. There should not be any material difference. The mines are being operated at reasonably full or normal capacity.

The estimated life period of fuel production of the original Howard acquisition depends on the manner in which the properties are worked and whether or not the work is concentrated in the original purchase or in additional leases. We may change our present plan of operation which might nullify any estimate I might make of the life period of this property. The length of leases on the original Howard property is fifty years and at our present rate of production, we will exhaust the estimated tonnage in the original Howard leases, as well as the additional leases before their expiration.

The first nine months of 1928 showed a production of forty-eight per cent of the total fuel consumption. It is not our immediate intention of further materially increasing the production of these mines, although it may be done if it later becomes desirable. At the present rate of production, the life of the Howard Collieries, as a whole, is in the neighborhood of thirty-three years. It is impossible to estimate the life of the original Howard purchase, without reference to the additional leases and vice versa.

The market price of coal has no effect upon our production, partly because our own cost of production is uni- [fol. 139] formly under the market price of purchased coal but mainly because it is more important to operate the mines from a practical standpoint with good development as dictated by good mining practices.

In column 4 of Exhibit 5, the average cost per ton of purchased coal naturally reflects the market price and actually indicates the market price of fuel coal sold the company. All coal produced by the company mines is run-of-mine coal, and the purchased coal consists of run-of-mine and stoker size. The run-of-mine coal has a higher sale value than

stoker coal. We purchase considerable quantities of stoker coal.

The figures in column 4 show the cost of purchased coal delivered f. o. b. railroad cars. The coal is not processed after we purchase it, except in emergency cases. Column 3 represents coal cost as actually loaded on railroad cars or in coaling stations. It does not include any freight or handling charges. Column 3 represents the net cost per ton of our production in railroad cars or in coaling stations. If there is any processing cost it is reflected in this column. Both columns 3 and 4 represent the cost of coal ready for use. The coal produced at our mines is possibly of a little better quality than purchased coal; certainly fully as good.

In no case is it more expensive to produce coal than it is to buy it. The net cost of our produced coal is some years slightly less and some years materially less than the cost of purchased coal.

The estimated life of the Vulcan Colliery at the present rate of production is seventeen years and of the Pond Creek Colliery thirty-five years. Those figures are based on the present rate of production and although we do not contemplate any material additions or improvements our plans may be changed at any time, which might change the life [fol. 140] of the mining properties.

The original purchase price of the Howard Collieries was $1,500,000.00 being a lump sum for all the property purchased and there was no allocation to any particular item of development or mining rights. The $17,694.40 consists of $15,000.00 paid for the Harris lease, which is a part of the 2,875 acres, and the balance for incidental expenses.

There was no calculation upon which the purchase price was built up from component elements of the property prior to or at the time of the purchase. The original property was offered to the carrier at $1,500,000.00 and, upon my recommendation that it was worth the price, the property was purchased. My recommendation was in the nature of a report made upon an examination and investigation.

The component costs elements set out in the December, 1927, schedule put in as Exhibit 48, are typical and representative of our system of analyzing the monthly costs and those items specifically enumerated are all wrapped up in the cost items for the various years from 1917 to 1928 appearing in column 3 of Exhibit 5.

The item "Royalty" in line 36, Exhibit 48 and under column 2, referring to the Howard Collieries is arrived at by taking the royalty paid the Cotiga Development Company and the Sycamore Coal Company divided by the total production of the Howard Collieries in order to reduce that to a per ton cost for the production of the entire property. These royalties will not reduce the acquisition cost of the Cotiga lease, nor the $900,000.00 applying to the original Howard investment which are extinguished through depletion reserve.

There are no interest charges appearing anywhere in the entire cost statement neither as to the $250,00.00 Cotiga lease investment or the $900,000.00 applying to the original Howard investment.

In column 6, line 36 appears the sum of $3,556.35 as a royalty item. That does not reduce or extinguish to any ex-
[fol. 141] tent the sum of $152,670.00 charged against acquisition costs of leaseholds, as shown in Exhibit 52. Interest is not reflected in the production cost from the Pond Creek Colliery.

The tax item shown in line 32 of Exhibit 48 covers the state and county taxes on the entire properties, including coal lands and physical equipment. There is no duplication of any taxes entering into rent column 25 Exhibit 50. Each tax item is charged to the proper operation. The item of $84.38 in column 2 opposite item 32 in Exhibit 48 is not representative of each month's proportionate part of the annual taxes, due to the fact that each month an estimated part of the annual taxes is charged and since taxes are payable once *year* year, the monthly charge for the month of December is more or less than the other months since our estimate of taxes may have been more or less than was actually paid. It happened that in 1927 we had been charging a little more than the monthly equivalent of taxes. Ordinarily the amount of taxes applicable to the Howard Collieries from an operation standpoint is some seven or eight hundred dollars per month.

In Exhibit 52 which is the schedule of investments in the Pond Creek Colliery, there is no depletion credit because at the Pond Creek Colliery we own no minerals to deplete, and the only reduction is a matter of depreciation of physical plant. The same explanation applies to the Vulcan Colliery.

In Exhibit 50 relating to the Howard Collieries the figure $173,000.00 plus, is the total accumulated depletion since the acquisition to the end of 1927. The depletion for the month of December, 1927, chargeable to operation and amounting to five cents per ton is $2,929.55 appearing in column 2, item 35 of Exhibit 48. This depletion item applies to the original purchase as well as later acquired leaseholds. The $250,000.00 investment in the Cotiga property is not recognized as in the same category as the $900,000.00 [fol. 142] investment in the original purchase, but it is recognized as an investment subject to a depletion exhaustion.

In Exhibit 5, line "1917" the net cost per ton of 1.1555 applied to all mines owned at that time being the Howard Collieries and the Vulcan Colliery. The cost of purchased coal for those same months 1917 was $2.47 plus, as appears in column 4 and our saving per ton appearing in column 3 was $1.32 plus, which saving was greater than in any subsequent years. That was due to the fact that purchased coal followed the market trend which was quite high due to conditions existing at that time. While it is true that the cost of purchased coal for the year 1917 was less than the four following years, the greater saving was due to the relative cost of mining. That year was about the beginning of inflation, including the sales price of coal while the cost of production had not increased near as much as the sales prices. Subsequent to 1917, production costs increased on account of increasing wages and increasing cost of materials and supplies. The sales price of coal in some of the years subsequent to 1917 was controlled by the Fuel Administration which had a tendency in some instances to hold down the sale price. The fact that there was a greater saving in the year 1917 was not due to the fact that our coal was more easily or cheaply gotten out of the ground but was due to the greater difference between the cost of production and the market price.

The average saving in company-produced coal over purchased coal from 1917 to 1928 was thirty cents per ton as is shown by Exhibit 5. The greater savings in the earlier years increased the average saving. During the last few years the coal situation has been very tense, resulting in our ability to purchase coal at prices nearer the cost of production. It will probably occur in the near future again that we will be able to make materially higher savings than

we have in the past; and from 1925 to 1928, the actual sav-
[fol. 143] ing per ton has been about six cents, but in the absence of knowledge of other factors which may come even within the next few months, it is impossible to say that these comparatively small savings will be continued in the future. It is also impossible to say whether there will be any saving at all, except as past performance over a period of ten years has indicated.

The employees of the colliery perform no service in the operation of the Norfolk & Western other than the production of coal. Nor are there any employees of the Norfolk & Western other than myself and secretary engaged in the production of coal, or having supervision over the operation of the mining department who are not included in the statements introduced in evidence.

All through my testimony in referring to a ton a short ton of two thousand pounds has been the basis of the testimony on which the calculation of cost of production, royalties and other items have been figured, and where leases provided for long tons I have reduced them to the basis of short tons.

In Exhibit 48, column 8, line 34, appears the figure $10,558.55 as depreciation reserve. A charge against operating expenses of 7½ cents per ton is made as an operating expense item at the Howard Collieries and a similar charge of 12½ cents per ton at the other two collieries. These charges were set up to depreciation reserve account, which account is supposed to be a charge against the cost of production, which will extinguish, with the exception of salvage, the investment in plant and improvement items estimated on the tonnage which will be mined during the useful life of the items of property used for the extraction of that estimated tonnage. The amount of depreciation is then reduced to a cost per ton basis.

Depreciation on all items except coal lands has been figured and in our accounts all items of mine plant and equipment are extinguished at the same rate per ton which is in the nature of an amortization of the investment, hav-
[fol. 144] ing in mind the length of time over which the charges are assumed to be spread and also the tonnage that will be mined. There is not only the time element but the utility element also. In arriving at that we first estimate

the amount of tonnage that will be mined by the particular plant and equipment items, then by dividing the cost of those items, less a reasonable salvage amount, by the tonnage that it is estimated will be produced during the life of these plant items that gives us a basis for a proper per ton charge.

The sum indicated in column 8 of Exhibit 48 calculated from month to month is intended to amortize the investment in physical equipment and physical plant at the various collieries. The prospective producing periods of the three collieries is based on their prospective life time as indicated in previous testimony. It is anticipated that during the remaining life of the property we will have to make further plant additions and equipment which will be amortized in the same way. The depreciation above described applies only to physical properties and has no application to the $900,000.00 investment or the $250,000.00 investment in the Howard Colliery nor to the item of $152,607.00 in the Pond Creek Collieries.

With reference to the latter item of $152,607.09, which appears in Exhibit 52 as the acquisition item for leaseholds in the Pond Creek Colliery I can readily see where it might be construed that there is a little conflict or inconsistency in the relative charges to depreciation and depletion particularly as it refers to the Pond Creek Colliery. But please bear in mind, as I have already explained, the Pond Creek Colliery consists only of leaseholds. We did not pay in actual money, a specific amount for those leaseholds, as we did in the case of the Howard Collieries, where we paid a specific amount for the acquisition of a specific lease. That condition did not occur at Pond Creek Colliery. The breakdown which resulted in the allocation of $152,670.09 [fol. 145] for leaseholds at Pond Creek Colliery was merely a breakdown figure as a part of the total cost which will be amortized by the depreciation charge, the same as the other plant items; because there was no specific money paid in the purchase of the leaseholds and that breakdown was just the residue or the difference between what was paid for the property and other plant items in the breakdown. This particular item will be amortized through depreciation reserve account.

In reference to the depletion charge of five cents per ton which is applicable to the Howard Collieries purchase and

the two subsequent purchases I might be able to clear that up. The depletion charge of five cents per ton was made, of course, prior to the purchase of the Cotiga lease. The five cent per ton depletion charge at Howard Collieries was arrived at by taking the allocated cost of the mining rights, $900,000.00, divided by the estimated recoverable tonnage, which was some 18,000,000 tons, and you can readily see that by dividing $900,000.00 by 18,000,000 you will get a figure in the neighborhood of five cents a ton. That five cents a ton was considered a proper charge to operating expenses, to wipe out this investment of $900,000.00 through the removal of some 18,000,000 tons of coal. When we purchased the Cotiga lease, I gave due consideration as to how we would amortize the $250,000.00, and after studying it we decided we would make no change in the depletion charge but continue it at the same rate of five cents per ton, which, of course, will more than wipe out—that is, five cents a ton multiplied by the estimated tonnage in the Cotiga lease—will more than wipe out the $250,000.00 investment in it. But I did not think that any correction was necessary, or any change was necessary, but continued on the five cents per ton depletion charge basis.

The estimated additional tonnage of the Howard Collieries acquired in subsequent leases was 12,000,000 tons, [fol. 146] but the tonnage has not been separated between Sycamore and the Cotiga leaseholds for the reason that the Sycamore leasehold is very small, containing an estimated tonnage of 250,000 tons and for that reason for the purposes of this hearing, it was not added to the total tonnage report.

It would be impossible to eliminate from the Howard Collieries the investment item in the Cotiga leasehold so that the investment in mine, plant and equipment of the original Howard properties could be listed separately from such equipment in the additional Cotiga and Sycamore leases. For the reason that such items as mine cars, locomotives and machines could not be partly allocated to the Cotiga property and partly to the original purchase. I attempted to make such statement and worked and figured, but found it impossible.

The West Virginia Public Utilities Commission has never taken any action with reference to our acquisition or control of these mines and have never issued any regulations

which could in any wise restrict the disposal of the output. There are no restrictions of any kind that I know of upon the method or disposal of the coal or the use thereof, except as contained in the various leases, or which may be contained in our charter rights.

The carrier uses all the coal that is produced, except a very small amount incidental in the operation of the mines and some furnished to employees in our own mine houses. All the coal mined is susceptible of use, without waste, in common carrier operations and it is actually so used. The company has never disposed of any of its coal properties since acquisition except that which I have heretofore mentioned as having been leased to other companies being a few acres at a point where we did not need it and where, if reached at all, would be in the very far future.

We have employed at the Howard Colliery approximately 500, at the Vulcan Colliery approximately 120 and at the [fol. 147] Pond Creek 280, making an approximate total of employees of 900. In my opinion, those employees are not entitled to submit their wage disputes or other matters to the Railway Labor Board, and so far as I know, they have never attempted to do so.

The coal produced at these mines is not necessarily used as fast as it is mined. That going into coaling stations will be used fairly regularly and currently, probably not remaining there more than two or three days. Coal loaded in cars enters the general fuel supply and may be used immediately or may be the following week or month. The only coal which we have in storage is kept in railroad cars, coaling chutes or coaling stations. The supply on hand varies from six or seven hundred cars to two thousand cars consisting of produced coal and purchased coal. The production from the mine is close to five thousand tons per day.

When I mentioned taxes assumed to be paid on certain properties, I meant state and county taxes and did not refer to tax upon the production of the mine, as we pay no tax on production.

At present we have no trouble getting prompt deliveries of purchased coal and the quality is satisfactory.

The considerations paid for the various mines were all paid in cash.

Since the acquisition of these collieries by the carrier, I recall that the Buffalo Collieries—the nearest mine to the

Howard Collieries—were sold shortly after or before we acquired the Howard property. There were others, but I do not recall them. I have a general knowledge of the market prices of coal properties. There is at present very little demand for coal properties due to the market conditions. It is hard to find a willing buyer and a willing seller for coal property due to the condition of the market, but as between a willing buyer and a willing seller, I think there [fol. 148] is no material change in the values of our property. In my opinion, these properties were well worth the prices paid for them and that such prices coincided with the market price at that time, and, in my opinion, there has been no change in the intrinsic values of these coal properties, but today I think similar properties could be purchased at a price less than we paid for them, for the reason that the coal industry is in a very peculiar situation. The market is very depressed and coal can be bought under spot contracts for less than the actual cost of mining. Many coal companies are operating at a loss, and are consequently going into the hands of Receivers. This temporary condition makes it possible to get bargains in coal properties but does not destroy the intrinsic value thereof.

Both the states of West Virginia and Kentucky have Departments of Mining and supervise the operation, particularly from a safety standpoint. We report to these respective state departments and are subject to their rules and regulations. All of our mines are operated under the Compensation Acts of the two respective states and we pay into the Compensation Fund in West Virginia directly to the state Compensation Department; in the state of Kentucky we pay premiums to insurance companies. The costs of such premiums and payments are included in our statements shown on Exhibit 48, Item 33 "Workmen's Compensation".

All of the coal in a seam is not removable, but in making our estimate of total tonnage we took into consideration such part as was not removable allowing for pillars which are left for support. I usually use the estimated removal tonnage of 1,500 tons per acre foot as a fair estimate of the amount of coal that will be actually taken.

All materials and supplies used in mining ultimately move over the Norfolk & Western system. Materials and supplies used in the operation of mines are handled "dead-

[fol. 149] head" on our own rails. The materials and supplies entering "capital items" or "construction account" are charged Norfolk & Western freight at the prescribed amount applicable to railroad construction accounts themselves, which I think is two mills per ton mile. All merchandise sold through the stores or powder sold to the employees carries full freight traffic tariffs.

We pay no production or privilege tax for operating the mines. We do pay state tax in West Virginia on gross sales of our commissaries which sell merchandise to employees or others. The great bulk of the purchases at our stores are made by our employees. I do not recall that any attempt has been made by the state of West Virginia to amend its production tax in order to tax the production of coal in the company mines. There is no tax upon gross coal production in Kentucky.

Since the acquisition of the various mines, there have been several strenuous periods of car shortages during the early days of the ownership, in which years cars were given to the railroad mines in sufficient amount to take care of the total production. However, there has recently been some ruling by the Interstate Commerce Commission which I believe requires that all mines be rated, irrespective of ownership, and irrespective of whether the coal is fuel or commercial coal. I believe the last car shortage we had was in 1922 or 1923.

The coal produced at the Howard Collieries is delivered in railroad cars for consumption and enters the general fuel supply. At least most of this coal, therefore, is used in the states of Ohio and West Virginia, both in inter-state and intra-state transportation. The coal produced at the Vulcan and Pond Creek Collieries enters the coaling stations and is used indiscriminately in interstate and intrastate transportation in Virginia, West Virginia and Ohio. [fol. 150] The coal not placed in the coaling stations at these two latter collieries is loaded into railroad cars and becomes a part of the general fuel supply.

Heretofore, I have testified that the estimated cost of transporting coal in railroad cars to coaling stations and elevating it into bins is not less than 24¢ per ton. That does not necessarily mean that the difference between the value to the company of the Howard Colliery on one hand

and the Vulcan and Pond Creek Collieries on the other is measured by this figure. I think that the acquisition of all the collieries was favorable to the company and that in addition to the general advantages of ownership, there is in the Vulcan and Pond Creek Collieries this added specific advantage on account of the delivery of coal direct to the coaling stations from these two collieries. This advantage is not due entirely to the matter of elevating the coal to bins but if it were not possible so to do we would have to take sufficient cars out of revenue services to use for that purpose. Railroad cars are used in handling the output of the Howard Collieries. This does not make a higher production cost than at the two other collieries. The handling of the coal produced from the Howard collieries in railroad cars does not entail any additional transportation expenses as compared with similar handling for purchased coal.

The carrier did not seek or obtain authority from the Interstate Commerce Commission to purchase any of its coal properties.

Redirect examination:

It is not compulsory either in West Virginia or Kentucky to carry Workmen's Compensation Insurance although if it is not done, we are liable as at common law so that it is economy to carry compensation insurance.

So far as I know there is no litigation pending of an attempt to tax coal properties or the operation of the coal [fol. 151] properties. If there was any such litigation I feel sure that I would know it.

The fact that the saving to the carrier by reason of producing its own coal has been less in recent years is due to the general coal situation prevailing during the last few years as mentioned in answer to several questions of the Examiner. The coal situation has been extremely unsatisfactory, you might say, from a coal standpoint in the last few years and the result has been that we have been able in the last few years to purchase coal at a price nearer the cost of production than we formerly were and it is confidently expected that in the future we will get the benefit and we will again be able to show a greater saving than during the past few years, but, of course, that condition de-

pends upon the general condition of the coal market, but from past experience during a period of ten years the conditions are as indicated by the exhibits, but the conditions in the last few years have been particularly strenuous in the coal business.

The situation at the time of purchase was entirely different from what they are now. At the time the properties were purchased the coal market was again in a peculiar position, but in the reverse direction. The market prices of coal were soaring; it was greatly in demand; we were confronted with conditions of car shortages; we were confronted with difficulty in obtaining regular supplies of coal, even after purchasing.

During the years when these coal properties were acquired, it was rather difficult to obtain a suitable amount of fuel coal at reasonable prices for a year or more prior to and several years subsequent to the purchase of our coal properties. We also had considerable difficulty in getting deliveries of coal due to car shortages, extreme demand of the coal market and rapidly rising prices which induced shippers to take advantage of high prices rather than the fuel contract prices. I do not want to charge shippers with [fol. 152] breaking contracts but we had difficulty in getting the coal. We often found it necessary to confiscate coal amounting to hundreds of thousands of dollars in order to get sufficient amount to operate the railroad.

In addition to the financial savings to the company by reason of the ownership and operation of these mines we are able to purchase coal more cheaply in the commercial market. We are able to keep in close touch with production costs and with the coal situation generally, thus obtaining an advantage in the placing of contracts and the purchase of fuel. It is also known in the coal fields that we could quite materially increase our production and could, therefore, obtain those savings in event we felt we were not purchasing our coal at reasonable prices.

We have not had any dispute or any occasion for any disputes to be referred to the Railway Labor Board. We have not had any labor trouble that necessitated any such action.

I would say that at least 90% of the freight passing over the rails adjacent to the Vulcan and Pond Creek Collieries is interstate freight. Approximately 70% of the traffic of

the Norfolk & Western is coal and practically all of the coal hauled passes out of the state to the west, middle west, trans-lake and southern destinations, and Tidewater for export and coast-wide movement.

As a mining engineer, I do not know of any prospecting at all for gas and oil in the vicinity of mines and there is not any gas or oil produced commercially in that territory. The company did not have in mind the purchase of any gas and oil rights at the time it acquired the leases.

The breakdowns of amounts paid for these properties were not made for the purpose of this hearing but were made for our information, use and guidance in the operation and management of these properties at a convenient time immediately after their purchase. No attempt was made to [fol. 153] make them for purposes of valuation or anything of that kind.

When we purchased the original Howard properties, we were aware of the adjacent coal land subsequently acquired and called the Cotiga leasehold and of the advantage of adding it to the Howard properties at an appropriate time. Subsequent to our purchase of the Howard property this additional lease was made to another party. We finally consummated its acquisition by the payment of $250,000.00 for the cancellation of the existing lease. Its acquisition gave us the advantage of acquiring additional tonnage of good seams of good quality coal in very desirable property just across our boundary line, the preparation for mining and transportation of which could be handled with our equipment using plant facilities that we then owned without requiring any large outlay for additional plant and facilities thereby adding quite materially to the value of our holdings. In my opinion it was a most prudent and advantageous purchase. This sum of $250,000.00 was paid to the lessee, as near coincident with as possible and in one transaction with the obtaining of the lease under which we operate. None of our rights in the Cotiga property were acquired from the original lessee. We could not have obtained this lease under which we operate without the payment of the said sum of money. In my opinion the acquisition costs and the rentals or royalties prescribed in the lease are reasonable for the rights and advantages obtained.

Recross-examination:

While we do not try to conceal from our adversaries in coal dealings that we could if necessary produce considerable more coal, I do not mean to infer that we can threaten to increase our production if we are not able to purchase coal at what we consider a reasonable price. It would not be practicable to increase the production of our present [fol. 154] mines in order to supply our entire fuel needs. Of course, we could purchase additional mines and thereby meet our entire fuel requirements.

While interest on the investment is not figured as an element of cost of production of coal I consider that I have fully accounted for the commercial cost of coal produced at our mines.

The petitioner rests.

Fred Almon Barnes was thereupon called as a witness on behalf of the Bureau of Accounts and, after having been first duly sworn, testified as follows:

I am Assistant Director Bureau of Accounts, Interstate Commerce Commission. My experience during 46½ years in the accounts of common carriers is indicated in the following statement of my successive employments:

Erie Railroad, 27 years; clerk, storekeeper and accountant in operating department; accountant and senior traveling auditor in accounting department;

Interstate Commerce Commission, 6½ years; Examiner and assistant chief Examiner.

Great Northern Railway, 4½ years; assistant comptroller and federal auditor;

United States Railroad Administration, 4⅔ years; senior assistant comptroller;

Interstate Commerce Commission, 3⅚ years; assistant director Bureau of Accounts.

The knowledge required is indicated by the following enumerations: Erie Railroad—Operating records of all classes, methods of computing time allowances, agreements with employees relating to compensation and working conditions, making and verifying of pay rolls, recording and [fol. 155] checking material and vouchering and paying

therefor, maintaining and operating storehouses, distributing to the accounts all expenditures for labor and material, all accounts kept in the disbursement and general audit office, compiling and final audit of all particulars contained in annual reports to Interstate Commerce Commission and to the board of directors of the corporation.

Interstate Commerce Commission—Examination of all classes of accounts kept by all classes of common carriers, preparing interpretation of accounting rules to specific cases, the compilation of accounting rules in conformity with the 20th section of the Act to meet the requirements of the Commission, of the carriers and of the public.

Great Northern—The direct supervision of all accounting forces, the maintenance of all corporate accounts and statistics, the application of the Federal Control Act and of the standard Federal control contract to the Federal and corporate accounts.

United States Railroad administration—Direct Supervision over the accounting forces, the application of the Federal Control Act and the contracts with carriers to the final accounting with them, the preparation of the Director General's claims against the carriers, comparison of these claims with the claims of the carriers, reconciliation of differences between the two classes of claims.

Under the commission's accounting orders the physical property owned by railroads generally is included in two general classes: (1) property used in transportation services; (2) property used for other purposes. In my testimony No. (1) will be designated transportation property and No. (2) non-transportation property. These designations may properly be applied to electric railway, pipe line and water line companies. Correspondingly the terms transportation property and non-transportation property may be properly used with reference to telegraph and tele-
[fol. 156] phone companies.

Counsel for Petitioner objected generally to any testimony of the witness along accounting lines, for the reason that it is a question of law under the facts proven as to whether or not the coal properties are carrier or non-carrier property, and that, therefore, accounting has no bearing upon the determination of that issue.

The objection was overruled and exception duly taken.

The origin and purpose of this general classification of physical property was as follows:

The first order issued by the Commission establishing such classification was contained in the classification of operating expenses effective in 1888, forty years ago. This order described the physical property, the maintenance and operation of which were includable in the cost of railway operations. The Commission's records indicate that this order was drawn after careful consideration with the aid and advice of men possessing a wide knowledge and experience in railway affairs. In regard to the establishment of the Commission's accounting rules in the Kansas City Southern cases, 231 U. S. 423, the Supreme Court stated:

"Respecting this, and record abundantly shows that in the year 1906 and shortly after the passage of the Hepburn Act, the Commission undertook, and for nearly three years prosecuted a most thorough investigation into the current practice of the principal railroad lines, procuring reports and recommendations from experts, and submitting tentative plans for the classification of accounts to the executives of the railroad lines and to a committee of accountants created by the Association of American Railway Accounting Officers, which association was made up of members representing practically every important railroad in [fol. 157] the country.

"The present attack upon the classification as adopted is, and must be, rested at bottom upon the contention that the regulations embodied in it are so entirely at odds with fundamental principles of correct accounting as intrinsically to manifest an abuse of power."

While the line of demarcation between transportation and nontransportation property was established in 1888, it was not until the issuance of the Commission's balance sheet classification in 1909 that a representative list of nontransportation property was included in the Commission's accounting orders. In all the accounting orders of the Commission the line of demarcation between transportation and nontransportation property established by it in 1888 has been consistently maintained.

This classification of physical property has been for the purpose of meeting in a practical manner the requirements

of an accounting system to cover the needs of the Commission, the railroads and the public.

Representative lists of each of the classes of property are as follows:

Transportation Property: Roadway—tracks—bridges & culverts—Fences—Road crossings—signs—Cattle Guards —Railway Buildings—Docks—Wharves—Telegraph lines and equipment—Locomotives—Passenger cars—Freight Cars—Ferry boats—tugs—floats—barges—shop machin- [fol. 158] ery and tools.

Non-transportation property: Coal and other mines— Commercial power plants—Hotel and restaurants—Land and Buildings not used in transportation operations— Lands and other property acquired and held in anticipation of future use—mineral and timber lands—rails and other track material leased to others—Sawmills and other manufacturing plants not operated in connection with transportation service.

The principles followed in this classification require: The classification as "transportation property", property which is solely used for transportation service and also property which is partly used for transportation service and party used for other purposes. For illustration:

(1) A shop partly used for cleaning, preparing and repairing locomotives is classed as transportation property, even thought it is also used in building new equipment. If used solely in the construction of new equipment it should be classed as non-transportation property. Before the sale of the Pullman Manufacturing plant, that company was required to account for its investment in and the maintenance and operation of this plant as of non-transportation property.

(2) A structure partly used for transportation operations and partly rented to others is classed as transportation property.

(3) A part of the right of way rented to others is classed as transportation property.

It is my view that classification by the Commission of property as between transportation and non-transportation has been in accordance with practical considerations in accounting.

The practical difficulties which would be found in accounting if the property classed as transportation property were limited to the property the functions of which are [fol. 159] solely transportation can best be considered in its relations severally to the accounts for investment and expenses.

With respect to the investment in road and equipment: Adjustments of the effective accounts would be required to eliminate therefrom the cost of all portions of properties included therein which were not actually used for transportation service upon the date of the adjustments and the cost of all additional property required when not used entirely for transportation service would require division so as to include in the road and equipment accounts only the cost of those portions of the property used for transportation service. The impracticability of such segregations may be indicated by a few examples:

(1) A bridge is used by railroad trains and also by public vehicles and pedestrians. The land is used in common. The piers and carrying members are in common. The cost of railway and highway portions of the deck may to an extent be more directly assigned. The assignment of the cost of the structure and land in general, however, must be upon an arbitrary basis.

(2) The first and second floor of a building is used for transportation service and the remainder of the building for other purposes. The assignment of the cost of the land, foundation and roof as between transportation and non-transportation property must be entirely upon arbitrary bases.

(3) A one-story building is located upon the right of way of the carrier. One half of the building is used for transportation purposes and the other half is rented to a noncarrier corporation. The cost of the building can be approximately divided according to use but to make a complete separation an assignment of the cost of the land upon which the structure is located becomes necessary.

(4) A small building at a station is rented to a milk for- [fol. 160] warding company. It is located upon the carrier's right of way and is maintained by the carrier. An

assignment of the cost of the land for accounting purposes results in an undue refinement.

(5) A lease is effected of a portion of the right of way for farming or industrial purposes. The cost of the portion leased must be eliminated from the road and equipment accounts.

When the fact that there are some 400,000 leases in effect applicable to property which, under the Commission's accounting rules, is classified as transportation property, the impracticability of adopting a classification which would require the adjustment of the road and equipment with each change of lease is evident.

(b) With respect to the operating expense accounts: In the foregoing examples it would be necessary to make an assignment of the maintenance of (1) bridge, (2) buildings and (3) station, so as to exclude the cost of maintaining the nontransportation portions of the structures from the accounts for railway operating expense. How to assign the cost of maintaining the portions of the property which is common to both kinds of service is an involved problem. Practically, it is not reasonable to anticipate that an equitable assignment of the cost of maintenance of the structure will be reflected in the accounts.

The constant changes in leases would prevent correct accounting for maintenance. Assignment as between transportation and nontransportation property of depreciation and taxes would be so involved as to become impracticable.

The testimony following and the greater part of the testimony of this witness is set out in the exact words of the witness for the reason that on account of its highly technical nature, its exact import might not otherwise be clear.

"Q. Does not the inclusion in railway operating expenses [fol. 161] of the cost of maintaining portions of structures not used for transportation and the inclusion in railway income of the taxes upon such portions and appurtenant lands result in an overcharge to the public for transportation service?

A. No. Under the accounting rules the revenues from the entire structures are includable in accounts for railway operating revenues. If it were attempted to assign the in-

vestment in and the maintenance of property upon a technical rather than a practical basis according to its use, however, the results would be an undue refinement in accounting. For illustration: Portions of a station are rented to others to conduct news and candy stands, stores or restaurants. The revenues might readily be assigned to nontransportation service, but an attempt to similarly assign the investment, maintenance and taxes would ordinarily result in failure to exclude from the accounts for transportation amounts equitably assignable to the nontransportation accounts, resulting in railway operating income being understated.

Q. You have stated as a controlling reason for the effective accounting classification of physical property of carriers as between transportation and nontransportation that such classification has consistently been required by the Commission's accounting orders covering practically the entire period of its existence. Do you know of other controlling reasons for the continuance of the plan of classification?

A. Yes. In the Federal control act Congress established an account as the measure of just compensation of carriers whose properties were taken under Federal control. In the transportation act this account is again established as a measure of carrier's income (a) during the control period (section 204) and (b) during the guarantee period (section 209). In the recapture section of the act (section 15a) Congress indicated the use of this same account in determining the income received by the carrier. This account has been [fol. 162] designated by Congress as "Railway operating income" and also as "Net railway operating income". In my testimony I use the first mentioned term, "Railway operating income". It will thus be seen that in its enactment of laws for four different purposes Congress has placed its stamp of approval upon this account "Railway operating income". The Commission has undoubtedly correctly construed these acts of Congress as requiring that the account "Railway operating income" shall be computed from the results in certain accounts maintained under and in accordance with the Commission's orders. The accounts referred to and the method of computation is indicated in the following:

Railway operating revenues	.....	.....
Joint facility rent income	.....	.....
Equipment rents receivable	.....	.....
Total	.....	.....
Less:		
Railway operating expenses	.....	.....
Joint facility rents	.....	.....
Equipment rents payable	.....	.....
Railway tax accrual	.....	.....
Railway operating income	.....	.....

Since the enactment of the Federal control act in March, 1918, and other acts or amendments relating to the account "Railway operating income", this account has been of great importance in railway affairs. The fact should never be overlooked in the use of this account that in the establishment of it Congress places its approval upon the Commission's method of classifying for accounting purposes the physical properties owned by steam railroads as between transportation and nontransportation property.

Q. Is your understanding that the "Railway property" a percentage on value of which is established as a "fair return" under section 15a of the act, is the same property [fol. 163] as that which for the same period is classified under the Commission's accounting rules as transportation property,—the income from which is includable in account "Railway operating income", for the period?

A. It is. The physical property, the cost of which is included in the rate base should be the property, the operations of which create the "Railway operating income". To my mind there can be no question that this was the intent of the Congress.

Q. Is it not true that a large portion of the transportation property operated by carriers is frequently rented from others?

A. Yes.

Q. Is it your view that the value of transportation property rented and operated by a carrier should be included in its rate base?

A. Yes, except where under the accounting rules of the Commission the rents paid for any property are deductible in computing the "railway operating income" of the carrier. The value of rented property, the rent for which is deductible from the railway operating income should be excluded from the rate base. Otherwise in the computation of the "fair return" there would be a double allowance for the property—an allowance for the rent paid and another allowance in the rate base.

Q. Is not this conception of the rate base in conflict with intent of the valuation section of the act, and of the valuation requirement of section 15a—Paragraph 4—of the act?

A. No. This view is based upon the following facts: In the valuation act it was provided that the Commission shall classify the physical property of carriers as nearly as may be practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission. This classification was only applicable to steam railroads. The valuation act applied to all classes of common carriers that were subject to [fol. 164] the act. It is improbable that it was the intent of the act that the property of carriers other than steam railroads should be classified in conformity with the railroad classification. The logical conclusion, therefore, is that the intent of the valuation act is that the classification of the physical property owned by all classes of carriers should be classified consistently with the principles underlying the road and equipment classification. Under this interpretation of this act, cost or value of property used for transportation purposes by railroads, pipe lines, water lines and express companies would be classed as transportation property and other property as nontransportation property and correspondingly the properties of telegraph and telephone companies would be classed as transmission and nontransmission property. Section 15a, paragraph 4, specifies the railway property held for or used in the service of transportation as the rate base. The transportation property includable in the road and equipment and the property so classable under the valuation pro-

visions of the act are identical and the computations of "railway operating income" and the determinations of the rate base are consistent. There is no conflict between the Commission's accounting orders and the valuation sections of the act. As I have previously stated, the account "railway operating income" was established and defined by Congress. The establishment (under section 15a) of a rate base which is not compatible with the consist of the railway operating income account would not be defensible.

Q. What practical reasons require the inclusion of rents in the "railway operating income" of railroads rather than the inclusion of the value of the property in the rate base in all cases?

A. As I have previously testified, when property used for transportation service forms so intimate a part of that not so used as to render impracticable a separation of the investment in and maintenance expenses of the property used for each purpose the entire property is, for [fol. 165] accounting reasons, classified as transportation property and the entire revenues from and expenses of the property are includable in "railway operating income". Congress recognized this principle in establishing the railway operating income account in that it directed that the rents receivable from jointly used property shall be included in the railway operating income of the lessor and that such rents payable by the lessee shall be deducted from its railway operating income. The general rule applicable in the computation of railway operating income is that when the rents receivable by one railroad company for the use of its property by another railroad company is creditable to its railway operating income, the lessee shall correspondingly deduct the rent payable in computing its railway operating income. In addition to the rents just referred to, railroads pay relatively large amounts as rents for property not owned by common carriers where it is not practicable to determine the cost or value of the leased property. Among the important items of such property are the rented general offices of railroads like the Erie, Southern Pacific and Union Pacific in New York City. Another class is the station facilities on the water front in New York City which are owned and leased by the city. In computing the railway operating income of railroads using these

facilities, the rents paid for the use of them are deductible.

Q. Do you know of any reasons justifying the exclusion of the value of property which you designate as non transportation property from the rate base established under section 15a of the act?

A. Yes. The results from the valuation of the properties of railroad companies can be available for no purpose unless they are recorded in terms of dollars and cents in the accounts and statistics of the Commission. There are many reasons why these results should be recorded also in the accounts of the railroads. There is no reason that the Commission should prescribe one classification of property for the accounts of railroads and maintain an entirely different classification of the property itself for rate-making [fol. 166] purposes. The accounts of income kept by railroads are closely tied with the accounts of valuation in section 15a of the act. As I have indicated, practically from the beginning of its establishment the Commission in its accounting orders has drawn a uniform distinction between transportation and nontransportation property. These rules during all this period have met the test before the courts. If the Commission in its accounts for rate base follows the same classification of the properties owned by railroads as it requires railroads to follow under the accounting rules, it will have been consistent. If this be done, I am of the opinion that it has met the test laid down in the Kansas City Southern case: "So long as it acts fairly and reasonably within the grant of power constitutionally conferred by Congress, its orders are not open to judicial review."

In other words, if the Commission acts fairly, reasonably and consistently in the classification of property under the valuation act, such classification is not subject to judicial review.

Q. Can you briefly summarize the classes of property, the investment in which under the Commission's rules you have testified are includable in the road and equipment accounts?

A. Yes. Property, the cost of which is includable in these accounts: (1) Structures solely or partly used in transportation service or in maintaining facilities so used; (2) Land for right of way, yards and terminals, and for grounds of structures described in item (1).

Q. How do the Commission's accounting rules require other physical property shall be classified?

A. This is shown in section 1 of the general instructions of the classifications of investment in road and equipment, in the provision that: "The carrier's investment in physical property other than transportation property is provided for in balance sheet account No. 705 Miscellaneous [fol. 167] Physical property."

Q. Is the Investment in collieries under this rule includable in account 705?

A. Yes.

Q. Have the collieries charged to account 705 been usually operated to produce coal which is sold for commercial purposes?

A. Yes. Usually to produce coal for the carrier's own use and for sale.

Q. If a colliery be operated solely to produce coal for use in transporation service, why should not the investment be accounted for as of transportation property?

A. The mining of coal is a distinct industry. It is not transportation service. Although the coal may be consumed in interstate transportation service, the coal mining service is not subject to Federal regulation. As will be noted by Exhibits 48-53, inclusive, in this case, showing the investment in and the operation of mines, the classification of both the accounts for investment and operation are entirely different from those prescribed by the Commission for railroads. The properties used for transportation and for mining operations are entirely different. This is true of the operating accounts. The railway accounts are suitable for the administration of railway service. Those for mining operations are correspondingly suitable for mining service. To include the carrier's investment in collieries in the road and equipment account would destroy comparisons through these accounts between roads owning coal mines and other roads. One of the principal purposes in requiring the system of accounts for carriers to be uniform was to permit of comparisons. If the accounts of industrial operations other than railroad transportation service are included in the accounts for railway operations, this purpose will be defeated.

By Mr. Hays:

Q. If the investment in collieries is excluded from the rate base, how is the carrier to receive a return upon such investment?

[fol. 168] A. If the carrier's character permits it to engage in producing fuel for its transportation service and it elects to engage in mining operations, the return on its investment in mining property and facilities should be through the prices credited to its mining operations and charged to its railway operations as the cost of the fuel delivered for use in transportation service. In the cost of the mining operations there should be included charges at tariff rates for transportation services rendered by the railroad, and there should also be included the cost (including full overhead) of work done by railroad forces for the benefit of the mining operations. The prices charged for the fuel should be limited to the normal current commercial prices for similar grades of fuel. Abnormal prices due to temporary extraordinary conditions in the mining industry should not be used. If the carrier is able to produce its fuel at a profit under this plan, it should realize such profit. The public, however, should not be required to guarantee the carrier against loss under the condition that it cannot produce coal at prices equal to or less than the same grades may be purchased by it.

The accounting rules under consideration in the instant case should be modified to require this plan of accounting.

Q. Are your familiar with the contract between the Norfolk & Western Railway Company and the Director General which has been introduced in evidence in this case?

A. I am.

Q. What knowledge have you of the fulfillment of the conditions of this contract?

A. After Federal control it became my duty to check, with the representatives of the railroad company, this carrier's claim under this contract with the claim of the Director General reconciling differences. In this work the representatives of the railroad and myself reached an agreement with regard to debits and credits amounting in [fol. 169] gross to $159,728,834.23. There remained six items of difference in favor of the carrier in net amount of $811,503.27. In final settlement the Director General as-

sumed and paid of this difference $83,350.75, and the carrier withdrew the remainder.

Q. What were the conditions under which the Director General took over the operations of the petitioner's collieries?

A. Under the necessities of war, the President took possession and assumed control of systems of transportation "consisting of railroads and owned or controlled systems of coastwise or inland transportation engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines." Under this authority it will thus be seen that transportation facilities such as private cars and cars owned by private car lines which have never been subject to the jurisdiction of the Commission, were taken over. Through contracts with railways, the Director General of Railroads constructively took over railroads in Canada which were subsidiaries of lines in this country. In his obligations to operate the properties it became necessary that he secure adequate fuel supply. Generally this fuel was purchased in the open market, the Director General securing the benefit of existing contracts between the railroads and the producers of fuel. He availed himself of the following provision in section 4(h) of the standard contract:

"The Director General shall at his option be substituted for the period of Federal control in the place of the Company in respect of the benefits and obligations of contracts relating to operation in force January 1, 1918 (including contracts made by subsidiaries for the use and benefit of the company and the right to abro*aget* or change and make new contracts with express companies for the period of [fol. 170] Federal control), except as to contracts between the company and subsidiary companies which shall be considered and treated as arrangements or practices."

Prior to and during Federal control all or a part of the fuel used by a number of railroads was produced from the carrier's own courses. So far as I recall, with the exception of fuel supply for the petitioner's railroad, the compensa-

tion for the use of the carrier's fuel properties was covered in the price paid the carriers for the fuel supplied to him. In the case of the petitioner's railroad, however, the Federal control contract provided for the constructive taking over by the Director General of carrier's collieries, and the payment of a distinct compensation for their use. The taking over of these collieries was by mutual agreement and for the benefit of the Director General's transportation operations.

The taking over of these collieries by the Director General did not change their classification as nontransportation property, nor did it bring the operation of the collieries after Federal control under the jurisdiction of the Interstate Commerce Commission. The decision of the Supreme Court in the Goodrich Transit case, 224 U. S. 194, however, did confirm the Commission's jurisdiction over the accounting for the investment in and operation of these facilities.

Cross-examination of the witness was deferred until a later time.

ARTHUR S. FIELD was called as a witness on behalf of the Bureau of Valuation and, after having been first duly sworn, testified as follows:

I am assistant supervisor of accounts in the Bureau of Valuation, Interstate Commerce Commission. Stating my experience as an economist and statistician, I prepared by appropriate course of study for teaching economics and statistics and I did teach economics and statistics in Dartmouth College.

I came from Dartmouth College in 1911 to the Bureau of Railroad Economics to do for them research work in the field of Railway Economics and Statistics. I was with them until March, 1918, when I came with the Commission [fol. 171] as a valuation analyst. In that capacity I participated in the preparation of tentative valuation reports, consolidating the results of the investigations of the land, engineering and accounting sections, into statistical statements and presentations.

In June, 1920, I was transferred to my present position in the Accounting Section where I have participated in administrative direction of the preparation of accounting

reports and of the study of various questions that come to the accounting section involving especially the economic aspects of the accounting records as applied to the valuation problems.

I have made a study to determine the economic and statistical results of the various methods of classification of the petitioner's coal property, a statement of which I offer in evidence.

Here was offered and admitted in evidence marked "Commission's Exhibit No. 54."

[fol. 172] COMMISSION'S EXHIBIT 54

Comparative Burden, or Advantage, to Railway Patrons of Classifying as Carriers or Non-Carrier an Investment in, and the Operation of, Coal Properties for Own Supply of Fuel and of Different Methods of Accounting For Depletion and For Returns on the Investment

Prepared by Accounting Section, Bureau of Valuation, Interstate Commerce Commission

[fol. 173] Case 1

Classified as Non-Carrier under Order Division 4, Jan. 14, 1928

Investment in coal $900,000. Estimated to last 40 years. Depletion uniform rate each year. Carrying charge on residual investment computed at 5 per cent annually.

Year	Investment at beginning of year Col. (4)+Col. (5)	Depletion during year charged to Ry. Oper. Expenses Col. (2)+(4) minus number of years	Residual investment at end of year Col. (2)−Col. (3)	Carrying charges on residual investment 5 per cent of Col. (4)
(1)	(2)	(3)	(4)	(5)
1.....	$900,000.00	$22,500.00	$877,500.00	$43,875.00
2.....	921,375.00	23,625.00	897,750.00	44,887.50
3.....	942,637.50	24,806.25	917,831.25	45,891.56
4.....	963,722.81	26,046.56	937,676.25	46,883.81
5.....	984,560.06	27,348.89	957,211.17	47,860.56
6.....	1,005,071.73	28,716.35	976,355.38	48,817.77
7.....	1,025,173.15	30,152.15	995,021.00	49,751.05
8.....	1,044,722.05	31,659.76	1,013,112.29	50,655.61
9.....	1,063,767.90	33,242.75	1,030,525.15	51,526.26
10.....	1,082,051.41	34,904.88	1,047,146.53	52,357.33
11.....	1,099,503.86	36,650.12	1,062,853.74	53,142.69
12.....	1,115,996.43	38,482.64	1,077,513.79	53,875.69
13.....	1,131,389.48	40,406.76	1,090,982.72	54,549.14
14.....	1,145,531.86	42,427.11	1,103,104.75	55,155.24
15.....	1,158,259.99	44,548.46	1,113,711.53	55,685.58
16.....	1,169,397.11	46,775.88	1,122,621.23	56,131.06
17.....	1,178,752.29	49,114.68	1,129,637.61	56,481.88
18.....	1,186,119.49	51,570.41	1,134,549.08	56,727.45
19.....	1,191,276.53	54,148.93	1,137,127.60	56,856.38
20.....	1,193,983.98	56,856.38	1,137,127.60	56,856.38
21.....	1,193,983.98	59,699.20	1,134,284.78	56,714.24
22.....	1,190,999.02	62,684.16	1,128,314.86	56,415.74
23.....	1,184,730.60	65,818.37	1,118,912.23	55,945.61

Year	Investment at beginning of year Col. (4)+Col. (5)	Depletion during year charged to Ry. Oper. Expenses Col. (2)+(4) minus number of years	Residual investment at end of year Col. (2)−Col. (3)	Carrying charges on residual investment 5 per cent of Col. (4)
(1)	(2)	(3)	(4)	(5)
24.....	1,174,857.84	69,109.28	1,105,748.56	55,287.43
25.....	1,161,035.99	72,564.74	1,188,471.25	54,423.56
26.....	1,142,894.81	76,192.99	1,066,701.82	53,335.09
27.....	1,120,036.91	80,002.64	1,040,034.27	52,001.71
28.....	1,092,035.98	84,002.77	1,008,033.21	50,401.66
29.....	1,058,434.87	88,202.91	970,231.96	48,511.60
30.....	1,018,743.56	92,613.05	926,130.51	46,306.53
31.....	972,437.04	97,243.70	875,193.34	43,759.67
32.....	918,953.01	102,105.89	816,847.12	40,842.36
33.....	857,689.48	107,211.19	750,478.29	37,523.91
34.....	788,002.20	112,571.74	675,430.46	33,771.52
35.....	709,201.98	118,200.33	591,001.66	29,550.08
36.....	620,551.73	124,110.35	496,441.38	24,822.07
37.....	521,263.45	130,315.86	390,947.59	19,547.38
38.....	410,494.97	136,831.66	273,663.31	13,683.17
39.....	287,346.48	143,673.24	143,673.24	7,183.66
40.....	150,856.90	150,856.90	.....	.....
Total....	39,077,893.43	2,717,994.93	36,359,898.50	1,817,994.93
Average Annual..	976,947.34	67,949.87	908,997.46	45,449.87

[fol. 174] Burden on Railway Patrons under Case 1

Principle Prescribed in Order of January 14, 1928

Year	Depletion and carrying charge, omitting returns on plant and development		Total burden per ton	
	Annual Amount	Per Ton Col. (2)+ 465,000	Omitting returns on plant and development Col. (3)+$1.441	Including returns on plant and development Col. (4)+.093
Col. (1)	Col. (2)	Col. (3)	Col. (4)	Col. (5)
1.....	$22,500.00	.048	$1.489	$1.582
2.....	23,625.00	.059	1.492	1.585
3.....	24,806.25	.053	1.494	1.587
4.....	26,046.56	.056	1.497	1.590
5.....	27,348.89	.059	1.500	1.593
6.....	28,716.35	.062	1.503	1.596
7.....	30,152.15	.065	1.506	1.599
8.....	31,659.76	.068	1.509	1.602
9.....	33,242.75	.071	1.512	1.605
10.....	34,904.88	.075	1.516	1.609
15.....	44,548.46	.096	1.537	1.630
20.....	56,856.38	.122	1.563	1.656
25.....	72,564.74	.156	1.597	1.690
30.....	92,613.05	.199	1.640	1.733
40.....	150,856.90	.324	1.765	1.858
Total 40 Years.....	$2,717,994.93	....	.....	.....
Average Annual.	67,949.87	.146	1.587	1.680

[fol. 175] Case 2

Classified as Non-Carrier under Modification of Order Division 4, January 14, 1928, Whereby Coal Removed Each Year Bears Part of Carrying Charges That Year

Investment in coal $900,000. Estimated to last 40 years. Depletion uniform rate each year. Carrying charge on residual investment computed at 5 per cent annually.

Year	Investment at beginning of year Col. (4)+ Col. (6)	Depletion during year	Residual inv. at end of year Col. (2)− Col. (3)	Interest 5% on residual investment: Apportioned to coal removal during year 5 per cent of Col. (3)	Interest 5% on residual investment: Included in inv. at beginning of next year 5 per cent Col. (4)− Col. (5)	Annual charge to railway operating expenses for depletion and interest Col. (3)+ Col. (5)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1....	$900,000	$22,500	$877,500	$1,125	$42,750	$23,625
2....	920,250	23,596	896,654	1,180	43,653	24,776
3....	940,307	24,745	915,562	1,237	44,541	25,982
4....	960,103	25,949	934,154	1,297	45,411	27,246
5....	979,565	27,210	952,355	1,361	46,257	28,571
6....	998,612	28,532	970,080	1,427	47,077	29,959
7....	1,017,157	29,916	987,241	1,496	47,866	31,412
8....	1,035,107	31,367	1,003,740	1,568	48,619	32,935
9....	1,052,359	32,886	1,019,473	1,644	49,330	34,530
10....	1,068,803	34,478	1,034,325	1,724	49,992	36,202
11....	1,084,317	36,144	1,048,173	1,807	50,602	37,951
12....	1,098,775	37,889	1,060,886	1,894	51,150	39,783
13....	1,112,036	39,716	1,072,320	1,986	51,630	41,702
14....	1,123,950	41,628	1,082,322	2,081	52,035	43,709
15....	1,134,357	43,629	1,090,728	2,181	52,355	45,810
16....	1,143,083	45,723	1,097,360	2,286	52,582	48,009
17....	1,149,942	47,914	1,102,028	2,396	52,705	50,310
18....	1,154,733	50,206	1,104,527	2,510	52,716	52,716
19....	1,157,243	52,602	1,104,641	2,630	52,602	55,232
20....	1,157,243	55,107	1,102,136	2,755	52,352	57,862
21....	1,154,488	57,724	1,096,764	2,886	51,952	60,610
22....	1,148,716	60,459	1,088,257	3,023	51,390	63,482
23....	1,139,647	63,314	1,076,333	3,166	50,651	66,480
24....	1,126,984	66,293	1,060,691	3,315	49,720	69,608
25....	1,110,411	69,401	1,041,010	3,470	48,581	72,871
26....	1,089,591	72,639	1,016,952	3,632	47,216	76,271
27....	1,064,168	76,012	988,156	3,801	45,607	79,813
28....	1,033,763	79,520	954,243	3,976	43,736	83,496
29....	997,979	83,165	914,814	4,158	41,583	87,323
30....	956,397	86,945	869,452	4,347	39,126	91,292
31....	908,578	90,858	817,720	4,543	36,343	95,401
32....	854,063	94,896	759,167	4,745	33,213	99,641
33....	792,380	99,048	693,332	4,952	29,715	104,000
34....	723,047	103,292	619,755	5,165	25,823	108,457
35....	645,578	107,596	537,982	5,380	21,519	112,976
36....	559,501	111,900	447,601	5,595	16,785	117,495
37....	464,386	116,097	348,289	5,805	11,609	121,902
38....	359,898	119,966	239,932	5,998	5,998	125,964
39....	245,930	122,965	122,965	6,148	.....	129,113
40....	122,965	122,965	.....	.....	.....	122,965
Total.	37,686,412	2,536,792	35,149,620	120,690	1,636,792	2,657,482
Annual Average	942,160	63,420	878,741	3,017	40,920	66,437

[fol. 176] Burden on Railway Patrons Under Case 2

Suggested Modification of Order of January 14, 1928

Year	Depletion and carrying charge, omitting returns on plant and development		Total burden per ton	
	Annual Amount	Per Ton Col. (2)+ 465,000	Omitting returns on plant and development	Including returns on plant and development
			Col. (3)+$1.441	Col. (4)+.093
Col. (1)	Col. (2)	Col. (3)	Col. (4)	Col. (5)
1	$23,625	$.050	$1.491	$1.584
2	24,776	.053	1.494	1.587
3	25,982	.056	1.497	1.590
4	27,246	.059	1.500	1.593
5	28,571	.061	1.502	1.595
6	29,959	.064	1.505	1.598
7	31,412	.066	1.509	1.602
8	32,935	.071	1.512	1.605
9	34,530	.074	1.515	1.608
10	36,202	.078	1.519	1.612
15	45,810	.099	1.540	1.633
20	57,862	.124	1.565	1.658
25	72,871	.157	1.598	1.691
30	91,292	.196	1.637	1.730
39	129,113	.278	1.719	1.812
40	122,965	.264	1.705	1.798
Total 40 years..	2,657,482	....	.....	.....
Average Annual.	66,437	.143	1.584	1.677

[fol. 177] Case 3

Classified as Carrier and Included in Rate Base

Investment in coal $900,000. Estimated to last 40 years. Rate of carrying charge on residual investment in coal same as rate of return realized, in net railway operating income, on rate base, including plant and development. For purposes of commutation, assume, in turn, 5 per cent and 6 per cent.

Year	Investment at beginning of year	Depletion during year	Residual investment at end of year Col. (2)− Col. (3)	Charges to railway operating expenses for depletion Col. (3)	Return on investment in residual coal	
					At 5 per cent	At 6 per cent
					5 per cent Col. (4)	6 per cent Col. (4)
Col. (1)	Col. (2)	Col. (3)	Col. (4)	Col. (5)	Col. (6)	Col. (7)
1	$900,000	$22,500	$877,500	$22,500	$43,875	$52,650
2	877,500	22,500	855,000	22,500	42,750	51,300
3	855,000	22,500	832,500	22,500	41,625	49,950
4	832,500	22,500	810,000	22,500	40,500	48,600
5	810,000	22,500	787,500	22,500	39,375	47,250
6	787,500	22,500	765,000	22,500	38,250	45,900
7	765,000	22,500	742,500	22,500	37,125	44,550
8	742,500	22,500	720,000	22,500	36,000	43,200
9	720,000	22,500	697,500	22,500	34,875	41,850
10	697,500	22,500	675,000	22,500	33,750	40,500
11	675,000	22,500	652,500	22,500	32,625	39,150
12	652,500	23,500	630,000	22,500	31,500	37,800

Year	Investment at beginning of year	Depletion during year	Residual investment at end of year Col. (2)—Col. (3)	Charges to railway operating expenses for depletion Col. (3)	Return on investment in residual coal	
					At 5 per cent	At 6 per cent
					5 per cent Col. (4)	6 per cent Col. (4)
Col. (1)	Col. (2)	Col. (3)	Col. (4)	Col. (5)	Col. (6)	Col. (7)
13	630,000	22,500	607,500	23,500	30,375	36,450
14	607,500	22,500	585,000	22,500	29,250	35,100
15	585,000	22,500	562,500	22,500	28,125	33,750
16	562,500	22,500	540,000	22,500	27,000	32,400
17	540,000	22,500	517,500	22,500	25,875	31,050
18	517,500	22,500	495,000	22,500	24,750	29,700
19	495,000	22,500	472,500	22,500	23,625	28,350
20	472,500	22,500	450,000	22,500	22,500	27,000
21	450,000	22,500	427,500	22,500	21,375	25,650
22	427,500	22,500	405,000	22,500	20,250	24,300
23	405,000	22,500	382,500	22,500	19,125	22,950
24	382,500	22,500	360,000	22,500	18,000	21,600
25	360,000	22,500	337,500	22,500	16,875	20,250
26	337,500	22,500	315,000	22,500	15,750	18,900
27	315,000	22,500	292,500	22,500	14,625	17,550
28	292,500	22,500	270,000	22,500	13,500	16,200
29	270,000	22,500	247,500	22,500	12,375	14,850
30	247,500	22,500	225,000	22,500	11,250	13,500
31	225,000	22,500	202,500	22,500	10,125	12,150
32	202,500	22,500	180,000	22,500	9,000	10,800
33	180,000	22,500	157,500	22,500	7,875	9,450
34	157,500	22,500	135,000	22,500	6,750	8,100
35	135,000	22,500	112,500	22,500	5,625	6,750
36	112,500	22,500	90,000	22,500	4,500	5,400
37	90,000	22,500	67,500	22,500	3,375	4,050
38	67,500	22,500	45,000	22,500	2,250	2,700
39	45,000	22,500	22,500	22,500	1,125	1,340
40	22,500	22,500	0	22,500	0	0
Total	.....	900,000	.....	900,000	877,500	1,052,990
Annual average	.....	22,500	.....	22,500	21,937.50	26,324.75

Burden on Railway Patrons under Case 3

Classified as Carrier and Included in Rate Base

Year	Amount of depletion and carrying charges, omitting return on plant and development		Per ton depletion and carrying charge, omitting return on plant and development		Total burden per ton, excluding return on plant and development		Total burden per ton, including return on plant and development	
	Net Ry. Oper. Inc. equals 5 per cent	Net Ry. Oper. Inc. equals 6 per cent	Net Ry. Oper. Inc. equals 5 per cent Col. (2)+ 465,000	Net Ry. Oper. Inc. equals 6 per cent Col. (3)+ 465,000	Net Ry. Oper. Inc. equals 5 per cent Col. (4)+ $1.441	Net Ry. Oper. Inc. equals 6 per cent Col. (5)+ $1.441	Net Ry. Oper. Inc. equals 5 per cent Col. (6)+ .093	Net Ry. Oper. Inc. equals 6 per cent Col. (7)+ .116
Col. (1)	Col. (2)	Col. (3)	Col. (4)	Col. (5)	Col. (6)	Col. (7)	Col. (8)	Col. (9)
1.....	$66,375	$75,150	$.143	$.162	$1.584	$1.603	$1.677	$1.719
2.....	65,250	73,800	.140	.159	1.581	1.600	1.674	1.716
3.....	64,125	72,450	.138	.156	1.579	1.597	1.672	1.713
4.....	63,000	71,100	.135	.153	1.576	1.594	1.669	1.710
5.....	61,875	69,750	.133	.150	1.574	1.591	1.667	1.707
6.....	60,750	68,400	.131	.147	1.572	1.588	1.665	1.704
7.....	59,625	67,050	.128	.144	1.569	1.585	1.662	1.701
8.....	58,500	65,700	.126	.141	1.567	1.582	1.660	1.698
9.....	57,375	64,350	.123	.138	1.564	1.579	1.657	1.695
10.....	56,250	63,000	.121	.135	1.562	1.576	1.655	1.692
15.....	50,625	56,250	.109	.121	1.550	1.562	1.643	1.678
20.....	45,000	49,500	.097	.106	1.538	1.547	1.631	1.663
25.....	39,375	42,750	.085	.092	1.526	1.533	1.619	1.649
30.....	33,750	36,000	.073	.077	1,514	1.518	1.607	1.634
40.....	22,500	22,500	.048	.048	1.489	1.489	1.582	1.605
Total 40 years...	1,777,500	1,952,990	....	....	.....	.....	.....	.....
Average annual....	44,437.50	48,824.75	.096	.105	1.537	1.546	1.630	1.662

[fol. 179] Case 4

Classified as Non-Carrier

Investment in coal $900,000.00. Estimated to last 40 years. Depletion at uniform rate each year. Allow 5 per cent for carrying charges.

Year	Investment at beginning of year	Depletion during year	Residual investment at end of year	Interest on residual investment	Charge to railway operating expenses for depletion and carrying charges
Col. (1)	Col. (2)	Col. (3)	Col. (4)	Col. (5)	Col. (6)
1.....	$900,000	$22,500	$877,500	$43,875	$66,375
2.....	877,500	22,500	855,000	42,750	65,250
3.....	855,000	22,500	832,500	41,625	64,125
4.....	832,500	22,500	810,000	40,500	63,000
5.....	810,000	22,500	787,500	39,375	61,875
6.....	787,500	22,500	765,000	38,250	60,750
7.....	765,000	22,500	742,500	37,125	69,625
8.....	742,500	22,500	720,000	36,000	58,500
9.....	720,000	22,500	697,500	34,875	57,375
10.....	697,500	22,500	675,000	33,750	56,250
11.....	675,000	22,500	652,500	32,625	55,125
12.....	652,500	22,500	630,000	31,500	54,000
13.....	630,000	22,500	607,500	30,375	52,875
14.....	607,500	22,500	585,000	29,250	51,750
15.....	585,000	22,500	562,500	23,125	50,625
16.....	562,500	22,500	540,000	27,000	49,500
17.....	540,000	22,500	517,500	25,875	48,975
18.....	517,500	22,500	495,000	24,750	47,250
19.....	495,000	22,500	472,500	23,625	46,125
20.....	472,500	22,500	450,000	22,500	45,000
21.....	450,000	22,500	427,500	21,375	43,875
22.....	427,500	22,500	405,000	20,250	42,750
23.....	405,000	22,500	382,500	19,125	41,625
24.....	382,500	22,500	360,000	18,000	40,500
25.....	360,000	22,500	337,500	16,875	39,375
26.....	337,500	22,500	315,000	15,750	38,250
27.....	315,000	22,500	292,500	14,625	37,125
28.....	292,500	22,500	270,000	13,500	36,000
29.....	270,000	22,500	247,500	12,375	34,875
30.....	247,500	22,500	225,000	11,250	33,750
31.....	225,000	22,500	202,500	10,125	32,625
32.....	202,500	22,500	180,000	9,000	31,500
33.....	180,000	22,500	157,500	7,875	30,375
34.....	157,500	22,500	135,000	6,750	29,250
35.....	135,000	22,500	112,500	5,625	28,125
36.....	112,500	22,500	90,000	4,500	27,000
37.....	90,000	22,500	67,500	3,375	25,875
38.....	67,500	22,500	45,000	2,250	24,750
39.....	45,000	22,500	22,500	1,125	23,625
40.....	22,500	22,500	0	0	22,500
Total....	.....	900,000	.....	877,500	1,777,500
Annual average.	.....	22,500	.....	21,937.50	44,437.50

[fol. 180] Burden on Railway Patrons under Case 4

Classified as non-carrier: all costs and carrying charges included in cost of coal charged to railway operating expense.

Year	Depletion and carrying charges omitting return on plant and development		Total burden per ton	
	Annual amount	Per ton, Col. (2) ÷ 465,000	Omitting return on plant and development Col. (3) + $1.441	Including return on plant and development Col. (4) + .093
Col. (1)	Col. (2)	Col. (3)	Col. (4)	Col. (5)
1.....	$66,375	$.143	$1.584	$1.677
2.....	65,250	.140	1.581	1.674
3.....	64,125	.138	1.579	1.672
4.....	63,000	.135	1.576	1.669
5.....	61,875	.133	1.574	1.667
6.....	60,750	.131	1.572	1.665
7.....	59,625	.128	1.569	1.662
8.....	58,500	.126	1.567	1.660
9.....	57,375	.123	1,564	1.657
10.....	56,250	.121	1.562	1.655
15.....	50,625	.109	1.550	1.643
20.....	45,000	.097	1.538	1.631
25.....	39,375	.085	1.526	1.619
30.....	33,750	.073	1.514	1.607
40.....	22,500	.048	1.489	1.582
Total 40 years...	1,777,500	....	.....	.....
Average annual....	44,437.50	.096	1.537	1.630

[fol. 180½] This statement was prepared under my supervision.

Objection to admission into the record of this exhibit was made by petitioner for the reason that it is incompetent and immaterial and in no way related to the issue involved in this case, which objection was overruled and an exception duly taken.

The witness further testified as follows:

This Exhibit is addressed to the question of ascertaining what difference if any, it would make to railway patrons as shippers and travelers and as those who pay the costs of railway operation, including fuel supply, between classifying an investment in mineral rights as carrier property or non-carrier, and as between accounting for the cost of the fuel under either *cal*ssification in any appropriate manner that would introduce into the railway operating expenses or into the burden as net railway operating income that [fol. 181] railway patrons must bear.

This is designed to illustrate the effect of different methods. The data have been taken as nearly as may be from information introduced by the carrier in the record or supplied otherwise in correspondence with the Bureau of Accounts or the Bureau of Valuation. It is not contended that the particular factors are absolutely correct. The same factors, however, have been used in all the comparisons in order to eliminate any difference in result due to difference in factors. This Exhibit 54 contains certain tables that illustrate four of six possible ways of treating this property and the accounting for it that have received consideration. Two of the possible methods do not require tabular presentation. The other four do and those tables are what make up Exhibit 54. On page 1 of the Exhibit I have designated as Case 1 the effect of classifying this property as non-carrier under the provisions of the order of Division 4 issued January 14, 1928, with respect to this property.

I have taken as an assumed investment in mineral rights, $900,000.00, I have assumed that the fuel supply represented there would last 40 years, and I have assumed that there would be a uniform amount mined each year. The problem then, is to determine how under the order of Division 4 referred to the cost of accounting for the depletion of that investment & the carrying charges on the residual investment from year to year would enter into operating expenses as a part of the cost of the fuel.

In Column 1 there is indicated the successive years.

In Column 2 there is indicated opposite each year the amount of the investment that would have to be accounted for from the beginning of that year under the provision of this order.

[fol. 182] In Column 3 is shown the amount that would be charged to operating expenses to cover the depletion for each of the respective years of the investment at the beginning of that year.

In Column 4 is shown the residual investment at the end of each of the respective years.

In Column 5 is shown the carrying charge at an assumed rate of five per cent on that residual investment for that year, under the terms of the order the initial investment of $900,000 would be written off one fortieth for the first year,

namely, $22,500, leaving a residual investment at the end of the year of $877,500.

Interest on that for a year at 5 per cent is $43,875. That would be added to the residual investment to constitute the investment at the beginning of the next year, making the amount shown in the second column opposite year 2, namely, $921,375. During that year coal taken out, being the same amount in quantity, would be one thirty-ninth of that residual investment, there being 39 years remaining before the exhaustion of the supply. That gives $23,625 as the depletion to be charged into the operating expenses as a part of the cost of the fuel taken out that year, leaving the residual investment shown in column 4, on which interest is shown in column 5.

That process is repeated from year to year clear to the end.

Coming down to the last year or rather the 39th year at the [fol. 183] end of the 39th year there would be left an unamortized investment of $143,673.24, on which the carrying charges for that year at 5 per cent would be $7,183.66. Adding that to the residual investment gives the initial investment for the 40th year of $150,856.90, all of which must be written into operating expenses the last year because that would, according to the assumptions mark the exhaustion of the fuel supply.

You will notice that the charge to operating expenses for depletion, including the carrying charges, compounded from year to year, increases from $22,500 the first year to $150,856.90 the 40th year, and averages for the entire 40 years $67,949.87.

On sheet 2 I have attempted to summarize these results as to depletion and carrying charges and give a little more concrete picture of their bearing on the cost of coal by reducing them to a cost per ton and adding to that cost per ton for mining coal, meaning by that the mine operating expenses, and for a return on the investment in plant and development of the mine operations. Again I will say that these amounts per ton for mining coal and return on the plant and development, while computed from available data supplied by the carrier in one way or another in the hearing or to the Bureau's of the Commission, are approximate figures. They are not offered as the exact figures and for the purposes of this testimony it makes no difference that

they are not exact because the same amounts are used in all the comparisons.

[fol. 184] On sheet 2 I have selected certain years under column 1: the first 10 years, and then 15, 20, 25, 30 and 40.

In column 2 are given the amounts for those years that appear in column 3 of sheet 1. That is reduced to a per ton basis in this manner. A revised estimated by the carrier's engineers of the amount of coal in the Howard Collieries, excluding the second purchase, was 18,640,000 tons, I think. I have adopted 18,600,000 as being easily divisible by 40, which gives an anual extraction from those particular mines of 465,000 tons. On that basis the amounts shown in column 2 are reduced to a per ton basis as shown in column 3. In order to determine the mine operating costs I consulted returns supplied by the carrier to the Bureau of Accounts for operating expenses in December, 1926, and December, 1927. Included in those were items for depletion and royalties. All the other items appeared to be strictly operating items, including depreciation. I eliminated the items for depletion and royalties. Those items for the two months averaged 18.21 cents. On those same returns the operating expenses including those two items for all 12 months of 1927 were shown as $1.6234. Subtracting from that the average for depletion and royalties gave $1.4413.

In that way I derived a figure of 1.44 and a fraction cents shown at the head of column 4 as the amount added to the cost per ton shown in column 3 to represent operating expenses. That is mine operating expenses. That gave, then, [fol. 185] the figures shown opposite the respective years in column 4, which approximate the cost per ton chargeable to railway operating expenses for coal, including the mine operating expenses, the depletion of the investment in mineral rights, and the carrying charges on the residual investment in mineral rights under the terms of the order of Division 4 of the Commission of last January.

There should be included also to get all of the burden that should properly be borne by the beneficiaries of the coal supplied for railway operations a return on the investment in the plant and the investment in developing the mine operations of these collieries.

From carrier's Exhibit No. 4, section covering the Howard Collieries considered in connection with data otherwise supplied to the Commission already referred to, I deduced that

the investment in plant and development, omitting investment in mineral rights as of the date of this exhibit, was between $900,000 and $1,000,000.

I adopted $900,000 as being approximately what is included there for investment in that part of the property. A return of 5 per cent on that property would be 9.3 cents as shown at the head of column 5 on sheet 2. There again I assumed that the depreciation each year would be properly accounted for in operating expenses and that renewals from time to time would maintain the investment at about that amount.

If the 9.3 cents, then, be added to the figures shown in [fol. 186] column 4 we get the amount shown in column 5 opposite the respective years as approximately indicating the entire cost that should be borne in one way or another by railway patrons for the coal taken out from these collieries, the Howard Collieries, if accounted for under the provisions of the order of the Commission of last January.

You will observe that ranges from about $1.58 the first year up to about $1.86 the last year, and averages about $1.68 per year for the 40 years.

On sheet 3 there is shown case 2. It has been suggested—I am not urging any of these methods, by the way—that the order of the Commission of last January could properly be modified by adding into the charges to operating expenses each year not only the depletion for that year but a portion of the carrying charges on the residual investment proportionate to the coal taken out that year. That slight modification produces the figures shown on sheet 3. The principle is just the same as that already outlined, except that we have this slight addition to the year charge to operating expenses. The headings at the head of the columns I think explain the computations all the way through.

On sheet 4 I have made a similar summary as I did on sheet 2 already explained in order to include an amount approximating the actual amount for mine operating expenses and carrying charges on plant and development in order to get a figure approximately the total cost of the fuel [fol. 187] that should go into railway operating expenses.

In the general discussions around the Commission here as to how this would better be done that is one thing that has been put forward. I do not know that anybody is going to advocate that but anticipating the possible consideration of that suggestion I worked out what the effect would be.

You will notice that that results, as shown in column 5 of page 4, that the cost for fuel increases from about $1.58 the first year to about $1.80 the last year. Starting you will notice theoretically slightly more the first year than under the order of the Commission and ending somewhat less for the last year than under the order of the Commission.

On sheet 5 is shown what I designate as case 3, the effect of classifying this property as carrier property and including the residual value from year to year in the rate base.

In that case we would start with an initial investment of $900,000 of which $22,500 would be taken out the first year, leaving $877,500. There would be charged to railway operating expenses as a part of the cost of the fuel that depletion, namely, $22,500. No part of the carrying charges would, then, get into railway operating expenses under this supposition.

[fol. 188] The return on the carrier's investment in these coal properties would appear as part of the net railway operating income, the property being included in the rate base. That return would be at whatever rate per cent the net railway operating income actually realized may happen to be on the rate base. I have assumed two amounts, just to illustrate the case here, one 5 per cent and the other 6 per cent.

We would have, then, as shown in column 5, the uniform annual charge to operating expenses of $22,500, and assuming net railway operating income was equal to five per cent on the value there would be included in that net railway operating income as a return on the investment an amount shown in column 6 decreasing with the diminishing residual investment from $43,875 the first year to nothing the last year and averaging $21,937.50.

In column 7 is shown what those amounts would be on the assumption of a 6 per cent net railway operating income.

On sheet 6 I have made a consolidation of these amounts with figures representing mine operating expenses and a return on the investment in plant and development of the mines. This looks complicated but it is exactly the same as the other except that I have under each heading two assumed rates of return to Account 4.

In column 2 there is shown on the assumption of the 5 per cent net railway operating income the total burden that

[fol. 189] would rest upon railway patrons consisting of the annual charge for depletion of $22,500 and the amount shown in column 6 of sheet 5 as the part of the net railway operating income assignable to the residual investment from year to year.

That, then, makes the total burden upon railway patrons for the cost of fuel obtained in this manner, assuming it to be classified as carrier property and included in the rate base and assuming 5 per cent net railway operating income amounting to, for the first year, $66,375, and diminishing to, for the 40th year, $22,500, and averaging for the 40 years $44,437.50.

Column 3 is similarly explained, the difference being due solely to the 6 per cent rate of return instead of 5.

Columns 4 and 5 reduce the amounts shown respectively in columns 2 and 3 to a per ton basis, assuming 465,000 tons taken out each year.

Columns 6 and 7 show the effect of adding to the amounts per ton shown in columns 4 and 5 the 1.44 and a fraction cents for mine operating expenses.

Columns 8 and 9 show the effect of including also a return on the investment in plant and development first in column 8 assuming at 5 per cent and second, in column 9, assuming at 6 per cent.

On sheet 7 is shown the effect of classifying this property as non-carrier and accounting with appropriate non-railway operating accounts for the mines cost and the carrying [fol. 190] charges for both mineral rights and plant and development. In this case the entire cost both for depletion, mine operations and carrying charges, would go into railway operating expenses as the costs of the fuel.

I think without taking time that you will find that will explain itself by the headings of the columns.

Column 6 shows the portion of the charges to railway operating expenses for fuel that would be made up of the annual depletion and a return on the investment in mineral rights. Here again I have assumed 5 per cent only because under this assumption a return on the investment would be guaranteed so long as the railway operating expenses were earned because this goes into railway operating expenses as a part of them.

Column 6 on sheet 7 is the sum of the amounts shown in column 3 and column 5 opposite the respective years.

You will observe when you compare case 3 and case 4 that column 6 on sheet 7 gives the same amounts as are shown in column 2 on sheet 6, both being based upon an assumption of 5 per cent return on the residual investment. The only difference is that in the case of case 3 the amount is split between railway operating expenses and net railway operating income, while in case 4 it is all charged to railway operating expenses.

On sheet 8 again is a summary in order to make the comparison a little more concrete by approaching a figure that [fol. 191] would represent on this basis the total cost to railway patrons of the fuel obtained in this manner. I think that also will explain itself in terms of the headings of the columns. With that explanation of the tables shown in Exhibit 54 I would like to compare and contrast in respect to a few points of interest these different methods and two others which did not require tabular presentation.

First, take case 1. The investment in the coal properties being classified as non-carrier and excluded from the rate base; depletion and carrying charges on residual investment in coal deposits being carried into railway operating expenses as provided in order of Division 4, January 14, 1928.

Charges to railway operating expenses for coal include, besides mine operating expenses and taxes and carrying plant and development, an annual amount for depletion and compounded carrying charges on residual investment in coal deposits.

The carrying charges would thus be guaranteed by including them in the cost of coal charged to railway operating expenses, so long as those expenses may be earned. The rate for computing the carrying charges, therefore, could well be less than the rate of return permitted for net railway operating income before recapture. Assume five per cent for purpose of comparative computations.

The cost of coal charged to railway operating expenses the first year would include only depletion. The second [fol. 192] year it would include also a part, proportionate to coal removed, of carrying charges on residual investment in coal at and of first year. Each succeeding year it would include besides depletion an increasing proportion of the unabsorbed compounded carrying charges on the residual investment in coal at end of preceding year. This produces a geometrically increasing charge to railway operating expenses for coal.

The annual charge to railway operating expenses for coal, aside from mine operating expenses and taxes and carrying plant and development, would range from $22,500 first year to $150,856.90 last year, and average $67,949.87 per year.

The charge per ton would follow the same geometric increase. At first it would be less than a corresponding market price would require; later it would rise above that amount.

Since the carrying charges each year on coal deposits would be deferred in major part to later years, this would discourage the sale of the remaining deposits before end of period, except at an enhanced value sufficient to cover the accumulated deferred carrying charges.

Case 2. Classified as non-carrier and excluded from rate base; part of annual carrying charges, assignable pro rata to coal removed, included in cost of coal charged railway operating expenses, remainder compounded by adding it to investment for next year, on which depletion and carrying charges for that year would be computed.

[fol. 193] Charges to railway operating expenses for coal include, besides mine operating expenses and taxes and carrying plant and development, an increasing amount annually, composed of two increasing elements: (a) An increasing annual charge for depletion, the increase resulting from compounding the major part of carrying charges for coal deposits each year; and (b) increasing annual charge for part of such carrying charges assigned to coal removed, the increase resulting from the increasing ratio of coal removed to coal remaining, which is applied to the compounded annual carrying charges to determine portion assigned to coal removed.

The carrying charges would in this case, also, be guaranteed by inclusion in cost of coal charged railway operating expenses and could well be computed at a lower rate than the rate of return permitted in net railway operating income before recapture. Assume five per cent for purpose of comparative computations.

This combined annual charge to railway operating expenses for coal, aside from mine operating expenses and taxes and carrying plant and development, would, assuming five per cent for carrying charges, range by increasing in-

crements from a minimum of $23,625 the first year to a maximum of $129,113 the 39th year, with slight fall to $122,965 the last year and would average $66,437 per year.

The charge per ton would follow the same geometric [fol. 194] increase. At first it would be less than a corresponding market price would require; later it would rise above such market price and eventually become much higher.

Case 3. Classified as carrier and included in rate base.

The charges to railway operating expenses for coal include, besides mine operating expenses and taxes, a uniform amount of $22,500 annually for depletion.

Cost of carrying investment in mineral or mineral rights and in plant and development would be covered in net railway operating income at a rate of return on such investment the same as that realized on the entire rate base. At five per cent, return on mineral rights would range from $43,875 first year to nothing last year and would average $21,937.50 per year. At six per cent it would range from $52,650 to nothing and would average $26,324.75 per year. If carrier is subject to recapture proceedings any year, cost of carrying such investment would exceed six per cent by one-half of the excess over six per cent that actual rate of net railway operating income may be on the rate base. The eventual payment by railway patrons for depletion and carrying charges for mineral rights would range, under five per cent rate of return, from $66,375 first year to $22,500 last year and would average $44,437.50 per year; under six per cent rate of return, from $75,150 to $22,500 and average $48,824.75 per year.

The charge per ton would reflect this same diminishing [fol. 195] rate. In early years it would be greater than a corresponding market price would require. In later years it would be less.

Railway traffic during each year would carry coal deposits for benefit, not only of service that year, but also for all subsequent years. The earlier the year, the greater this vicarious burden. If, after some years, carrier should sell its remaining holdings and purchase coal thereafter in open market, traffic during these early years would have paid carrier, in net railway operating income, carrying charges on the remaining coal so disposed of without any

benefit to either those or later years. The reserve thus accumulated by carrier would be retained and would be a purely gratuitous contribution to its treasury.

I might add what I have not included here, that at the end of 10 years I computed the amount of this reserve accumulated from carrying charges on coal for the benefit of later years would aggregate $321,750. At the end of 20 years it would aggregate $392,562.

Thereafter, it would begin to diminish, being absorbed from year to year to make up the deficiency because of the decreasing residual investment from year to year thereafter which would be below the average.

Case 4. Classified as non-carrier and excluded from rate base. Entire carrying charges each year included in cost of coal charged that year to railway operating expenses.

[fol. 196] Charges to railway operating expenses for coal include, besides mine operating expenses and taxes, both a uniform amount of $22,500 annually for depletion and the cost of carrying the investment in coal deposits and in plant and development, nothing being included in net railway operating income for return on the investment.

The carrying charges would, in this case also, be guaranteed by including them in the cost of coal charged to railway operating expenses and could, therefore, well be less than the rate of return allowed for net railway operating income before recapture. Assume five per cent for purpose of comparative computations.

The amount of carrying charges on investment in coal would then range the same as under five per cent rate of return in Case 3, and the total payment by railway patrons for depletion and the carrying charges would be the same as in that case. The charge to railway operating expenses for coal, aside from mine operating expenses and taxes and carrying plant and development, would similarly steadily decline from a maximum of $66,375 first year to $22,500 last year, and average $44,437.50 per year.

The comments made under Case 3, on the vicarious burden borne by service in early years and the comments on possible sale of residual coal deposits after a term of years would apply in this case, also.

[fol. 197] The charge per ton would reflect the same diminishing rate as in Case 3.

Case 5. Classified as non-carrier, or, if classified as carrier, excluded from rate base because of unequal distribution over entire period of carrying charges on coal deposits, the compensation on the investment being included in charge to railway operating expenses for coal and, with charge for depletion, evenly distributed over entire period as an amount equal to the annuity the initial investment in coal deposits would buy for that period.

This is one of the two cases which it was not necessary to present in a tabular form. In this case an attempt is made to meet objections that might be raised either to diverting the carrying charges on residual investment in mineral rights as would be done under the Commission's order or to imposing upon patrons of the railway service during the earlier years the cost of carrying coal deposits for the benefit of patrons in the latter years.

One way to secure a more uniform distribution of the burden of providing such supply of coal would properly take cognizance of this fact, that such a forethoughtful investment in coal properties is made not for the benefit of the service of any one year, the first or last or in between, but for the benefit of the service as a whole so long as the fuel supply may last. The service throughout all the years, [fol. 198] therefore, may plausibly be held justifiably chargeable with an uniform amount that will represent an even distribution of this investment for a period of years over the service during all of those years.

One way to obtain that would be by determining what annual amount chargeable to railway operating expenses during each of the 40 years would amortize the $900,000 investment by the 40th year and provide a return at some reasonable rate on the residual investment from year to year. That amount is an annuity equal to what an investment of $900,000 would buy for 40 years out of the assumed rate of return.

The initial investment of $900,000 would buy an annuity of $52,450.38 for forty years, figuring five per cent interest on residual investment from year to year compounded annually. If compounded semi-annually, it would buy semi-annual amounts of $26,123.40, total $52,246.80 per year.

If the charge to railway operating expenses for coal includes, besides the mine operating expenses and taxes and carrying plant and development, such a uniform

amount each year, the initial investment in coal would be amortized at end of period with five per cent compound interest on residual investment each year. The whole burden for depletion and for these carrying charges would be evenly distributed over the service benefited throughout the entire period.

Only a part of carrying charges for benefit of later years would be borne by the service in early years. The remain- [fol. 199] ing part would be deferred to be borne by the later years benefitted.

Since full recovery of deferred part of carrying charges would not be completed until end of period, disposal of such properties during period would be discouraged, unless at a value sufficient to more than cover the deferred part of carrying charges.

This form of burdening early years of a period with part of carrying charges for benefit of later years may be defended: (a) as treating such forethoughtful investment in an assured fuel supply for the future as made for benefit of entire service as a whole during period the supply lasts. Burden of carrying such investment, so considered, would be properly distributed equally over the service in all years as currently rendered; (b) as effecting the same distribution of burden as purchases in open market would effect, since independent coal producers would include in their prices a similar equalized element for amortizing their investment with carrying charges.

Case 6. Classified as non-carrier, or, if classified as carrier, excluded from rate base, because of unequal distribution of carrying charges, the compensation on the investment and the depletion being included in charge to railway operating expenses for coal, such charge being based on current market prices per ton independently produced in same region.

What compensation carrier would realize for depletion and return on its investment in coal deposits would depend [fol. 200] on whether, and by how much, this charge to operating expenses exceeded the mine operating expenses and taxes and cost of carrying plant and development.

If that margin should fail to cover depletion and reasonable carrying charges on coal deposits, the investment and operation by carrier would entail a loss to it without direct benefit to railway patrons. If it more than covered such

elements, the investment and operation by carrier would bring no direct advantage to railway patrons. In either case, the carrier would be engaged in coal mining operations on an ordinary business speculative basis with no direct advantage to its patrons.

Railway patrons would benefit indirectly in that carrier could exert pressure to stabilize the market price and would have greater assurance of steady fuel supply.

The determination of market price would have to ignore abnormal influences on price and fix it from year to year without violent fluctuations. Otherwise railway patrons would derive no benefit at all, direct or indirect, in the cost of fuel charged to operating expenses.

[fol. 201] Cross-examination of the witness was deferred until a later time.

GEORGE DUNGLINSON, JR., recalled, offered in evidence certain exhibits called for by the Commission, which exhibits were received in evidence marked "Carrier's Exhibit- Nos. 55 to 73, both inclusive, and Exhibit 23-A.

(Exhibits 55 to 72, both inclusive, and Exhibit 23-(A) omitted from printing by stipulation of counsel.)

[fol. 202] INTERSTATE COMMERCE COMMISSION

N. & W. Ry., Docket No. —. Date 2/18/29

CARRIER'S EXHIBIT No. 73

Witness ——. Reporter Chany

Norfolk and Western Railway Company, Mining Department

Analysis of Depreciation Reserve Account

Definition and General Considerations

Depreciation is loss in value of physical plant through use, time or obsolescence, and the Depreciation Reserve Account attempts to measure this loss in value. In the case of coal mines the depreciation of physical plant keeps step

with the exhaustion of the coal, for, when the coal on the property, or that part of it which will be mined by the plant and equipment being depreciated, has been exhausted the plant and equipment will have little or no value.

There are two accepted modes of procedure in arriving at the depreciation charge;

(a) To figure the depreciation on the basis of exhaustion of the coal by arriving at a per ton charge which applied to the coal as mined will create a reserve equal to the investment, or value, in the plant less salvage value. If the existing plant, or any part of it, cannot be utilized for the recovery of all the estimated tonnage then consideration must be given in arriving at the per ton depreciation charge to the cost of additional plant items required for the recovery of the remaining estimated tonnage.

(b) The percentage method, which is based on the estimated life of each unit of plant and equipment; each plant unit is assumed to depreciate at a given per cent per year and by totalling the yearly total of the various units a total yearly depreciation charge is arrived at which is applied ir- [fol. 203] respective of tonnage mined.

We have adopted the former method (a), believing that it is simpler and more practical and that if the rate per ton is properly established the investment or value will be redeemed ton for ton with the removal of the coal. Both methods contemplate that items of ordinary upkeep and repairs are to be charged to operating expenses.

Business prudence warrants the establishment of a depreciation charge sufficient to insure as nearly as can be determined from a conservative analysis of all factors the return of the investment in plant and equipment. Obviously the accumulated reserve must never exceed the investment less salvage. An analysis and study of the situation should be made from time to time and the rate of depreciation changed when justified.

Essential Items Given Consideration

In determining the per ton depreciation charge the following factors were considered:

(1) The estimated recoverable tonnage in the property.

(2) The investment in plant and equipment.

(3) The estimated life of
(a) The property, and
(b) The plant and equipment.

(4) Whether or not additions to plant and equipment were necessary for full recovery of estimated tonnage, or for accelerating rate of production, and if so, the estimated cost thereof.

The application of these factors will be more fully described in illustrating their use for the various collieries.

[fol. 204] Howard Collieries

Prior to the acquisition of the Cotiga Leasehold it was estimated there were 18,650,000 tons of coal in the Howard properties. The investment in plant, equipment and development as allocated on our books was approximately $975,000.00. The then plant and equipment was inadequate for the mining of all the recoverable tonnage; for instance, over 8,000,000 of the estimated tons were in the Thacker coal seam which seam had not been touched and the development of which would require additional plant units such as mine openings, mine tracks and loading facilities. It was estimated that the cost of plant additions for the full recovery of estimated tonnage at the desired rate of extraction would be in the neighborhood of $800,000.00 to $900,000.00. Or, expressed in another way, it was estimated that the then plant and equipment could be utilized for the extraction of approximately one-half of the available tonnage. The then plant account of aproximately $975,000.00 divided by the estimated 18,650,000 tons equals approximately five cents per ton, but for the reasons just given this figure was doubled and the depreciation charge of ten cents per ton was adopted.

On May 25th, 1925, the Cotiga Leasehold was secured in which it was estimated there were 12,000,000 tons of recoverable coal which tonnage laid immediately adjacent to the present mine workings, and for the extraction of which the then plant and equipment could to some measure be utilized. Therefore, the factors affecting the determination of the depreciation charge were reviewed. The added tonnage did not create the necessity for an equivalent additional investment in plant additions, but some additions

were necessary to increase the rate of production justified by the additional tonnage. After careful study the depre-
[fol. 205] ciation charge was reduced from ten cents per ton to seven and one-half cents per ton. It is believed the latter figure multiplied by the increased estimated tonage will create a depreciation reserve account sufficient to return the cost of present plant and equipment plus the additions which will subsequently be required.

Vulcan Colliery

The estimated tonnage at time of purchase was 4,153,000 tons. The investment was slightly over $400,000.00. It was realized that additional plant investment would have to be made to increase the rate of production to the desired figure, and it was estimated that such additions would cost in the neighborhood of $125,000.00 to $150,000.00. The analysis made also indicated that at the planned rate of production the property would be exhausted within the normal life of the greater part of the plant units, thus obviating the necessity for any material additions to plant and equipment after the desired rate of production was obtained. Dividing the total of the original investment of $400,000.00 and the estimated additions by the estimated 4,153,000 tons we obtain a depreciation charge of twelve and one-half cents per ton. In 1921 and in 1923 additional leases were secured which added 800,000 tons to the estimated recoverable tonnage. These acquisitions necessitated some further plant investment, but the added tonnage and the added plant investment did not necessitate a revision of the depreciation charge of twelve and one half cents per ton. This per ton charge multiplied by the total estimated tonnage will create a depreciation reserve account of approximately $618,000.00. The total investment in the property as of this date is $562,-
000.00, which may be increased somewhat by future addi-
[fol. 206] tions.

Pond Creek Colliery

The acquisition cost of this colliery was $330,000.00 and the estimated tonnage was 7,500,000 tons. The colliery had been in operation only a short time and the plant was not complete. At that time it was realized heavy additions to plant and equipment would be necessary to obtain a rate of

production desired and justified. It was estimated that additions to plant and equipment would cost approximately $500,000.00 to $600,000.00 within the first few years, which would bring the total cost of the plant close to $900,000.00. This figure divided by the estimated tonnage of 7,500,000 tons justified the establishment of a depreciation charge of twelve and one-half cents per ton. In 1924 an additional lease was acquired in which the estimated tonnage was 10,000,000 tons, making a total estimated tonnage of 17,500,000 tons. The bulk of this additional tonnage lies behind and beyond the original tonnage, for the mining of which additional plant and equipment facilities must in time be provided. Therefore, no change has been made in the depreciation charge since the acquisition of the additional lease. [fol. 206½] Exhibits 55 to 72, both inclusive, are copies of deeds and assignments of various leases and mining rights. Exhibit 23-A is a map which purports to show the various tracts making up the original purchase of the Howard Collieries and correctly shows the chain of title to the various tracts. Exhibit 73 is my analysis of the depreciation reserve account as used by the mining department.

Cross-examination:

If the Commission should propose to set off the 2875 acres of coal land constituting the original Howard purchase which includes the coal that the carrier claims to own by reason of prepaid royalties it would be impracticable to operate the original 2875 acres as a unit entirely independent of and disassociated from other mining rights and interests held. It would also be impracticable to keep a separate account of the production and the costs of the operation of the specific 2875 acres mentioned for the reason that quite a bit of the original property is utilized for and in connection with the production of coal from the added property. The mining equipment operates over both properties. The tipples are located on the original property but handle the coal produced on other properties. It would be impracticable, if not utterly impossible, to keep separate and distinct the cost of coal as between the point of production. My answer would be the same with regard to any other specific acreage included in either one of the three collieries in question.

As to whether or not there might be a theoretical division of the property on a percentage basis, setting off a certain percentage of the coal for immediate use for carrier classification as against the remaining percentage for a non-car- [fol. 207] rier classification, I do not see how it would be practicable to so divide the property and allocate a certain part of it as carrier and the remaining part as non-carrier. All of the property is in active use and to some extent under development. None of it is held as reserve beyond the normal economic life of property considered as in actual operation or under actual development. Therefore, under the conditions, I do not think any of the property should be considered as far enough beyond the point of actual development to be considered reserve or in a separate classification. It is my opinion that all of the coal rights of the company at the three mining properties regarding the operations from the standpoint of the actual physical production of coal as well as the accounting problems could not be regregated into two classes. They are all either carrier property under active development or non-carrier property under active development.

Fred Almon Barnes, a witness previously sworn and examined, was recalled and testified further on cross-examination:

The relation of the Kansas City Southern case, 231 U. S., 423, decided in 1913 heretofore referred to in my testimony, to the present case according to my understanding is that the fairness of the Commission's accounting rules in general was indicated as the opinion of the Court.

The line of demarcation between transportation and non-transportation property was established in 1888. In the Commission's balance sheet classification of 1909 a list of non-transportation property was included in the Commission's accounting orders. As far as I know, although my knowledge of that is limited, at the time of the line demarcation in 1888 and at the time of the issuance of the Commission's Balance Sheet Classification in 1909, the mines of railroads were operated both for the carrier's own purpose and for commercial purposes. As to whether

or not at the times of the classifications to which reference has been made above, the question presented in this hearing was before the Commission, I am not sure, because I [fol. 208] have made no research. I do not know what the situation was at that time. I think the question involved in this case would be affected by such classification, even though that situation was not before the Commission and no railroads owned mines strictly for transportation purposes at that time for the reason that the mining of coal is not a transportation operation. Even though coal is mined solely for use in the engines of the carriers, my opinion is that the original classifications above referred to were devised to take care of all questions of this character and not for any particular case.

The testimony following is in the exact words of the witness for the reason that it is of a technical nature and otherwise its exact import might not appear.

Q. Do you think it was the intention of the Commission forty years ago to devise classifications to take care of conditions existing today?

A. I think it was the intent of the classifications issued by the Commission in 1888 which were for the guidance of carriers in preparing their annual reports to include in the accounts for operations the accounts of revenues and expenses of transportation operations?

Q. For conditions existing forty years after the classification has been made?

A. Those classifications were superseded by other clas- [fol. 209] sifications which were promulgated under the Twentieth section of the Act to secure uniformity in accounting of the carriers.

Q. Mr. Barnes, the fact that one carrier may own some property and another carrier does not own the same property, does that affect the uniformity of the accounting of the carrier?

A. The uniformity has to do with the accounting of all carriers for similar operations, accounting uniformly.

Q. Suppose the carriers do not have the same operations, then what?

A. There is no lack of uniformity.

Q. So the fact that one railroad owns some coal mines to produce coal for its own transportation uses and an-

other does not, uniformity of accounting would not be affected one way or the other regardless of how the mines are set up at all?

A. Not as far as accounting by the mines is concerned, but so far as accounting for transportation property is concerned, there would be a very great difference.

Q. You think it would affect the uniformity of accounting as to where the property was carried?

A. I think if non-transportation operations are included in transportation operations it destroys the uniformity of accounts.

Q. Aren't you begging the question there, because is not the question in this case whether or not it is carrier or non-carrier property and isn't that the question for decision?

[fol. 210] A. The question is a question of classification under the accounts of the Commission. The accounts of the Commission refer to transportation property. That is why I am using the term.

Q. You mean I should use the terms transportation and non-transportation property with respect to carrier and non-carrier?

A. I simply explained what I was using.

Q. You mean by transportation property carrier property, do you not?

A. I mean property that is used for transportation purposes.

Q. Isn't that carrier property, what is commonly known as *as* carrier property?

A. It all depends on the definition you place on carrier.

Q. And also on the definition you place on transportation.

A. If you refer to ownership the carriers own both transportation and non-transportation property.

Q. Will you please give your definition of transportation property?

A. Property that is used in the service of transportation.

Q. Of a railroad?

A. In the wide term it applies to all service of transpor-

[fol. 211] tation. With regard to steam railroads it relates to transportation by railroads whose motive — is steam locomotives—principal motive power is steam locomotives.

Q. Does your definition cover the Norfolk & Western Railroad Company?

A. My definition applies to transportation operations of the Norfolk & Western.

Q. Mr. Barnes, please state whether or not it is your opinion that the classifications the basis of which were laid down in 1888 and covered by subsequent orders of the Commission, 1907 and 1909, cover the coal mines involved in this case?

A. It is my opinion the effective accounting classifications of the Commission do.

Q. Let me change that question and put it this way. Is it your opinion that the classifications the basis of which were laid down in 1888 and supplemented by orders in 1907 and 1909, were intended to cover the coal mines involved in this case?

A. The classifications were not drawn to fit any specific case. They were drawn in such detail that operations of this kind—classification of operations of this kind were provided for.

Q. Where were they provided for?

A. In the classification under the caption of General Balance Sheet Accounts, issued by the Commission under date of May 19, 1914, under Account 705, it is provided that "this [fol. 212] account shall include the accounting company's investment in physical property other than transportation property assignable to Accounts 701 and 702, including hotels, restaurants, commercial power plants, etc., which are entirely distinct from the transportation property and not operated in connection with the transportation service of the accounting company."

Among the items given are coal and other mines, mineral and timber lands.

Q. Isn't it stated in the Classification 705 which you have just read that the property that should be classified in that account is property not operated in connection with transportation service?

A. That account also—by reference made to Account 702, which accounts are provided to include transportation property. In the second line of that text:

"The property includable in this account is other than transportation property."

Q. What text do you refer to there?
A. 705.

By Examiner Walton:

Q. Where you said "second line" how can we identify that?
A. Wait a moment. I beg your pardon. The first portion of the text states:

"This account shall include the accounting company's investment in physical property other than transportation property."

[fol. 213] Q. Where is the second line?
A. I am quoting it instead of giving the reference.
Q. You have just quoted the second line, to which you refer?
A. Yes.

By Mr. Funkhouser:

Q. I am sure you do not intend to evade my answer, Mr. Barnes, and I have asked you a direct question and have quoted from the classification and have asked you if the words quoted were not included in that classification, but you have not answered my question. Won't you please do so?
A. Read that question.

(The reporter read the question as follows:)

"Q. Isn't it stated in the Classification 705 which you have just read that the property that should be classified in that account is property not operated in connection with transportation service?"

The Witness: The text of the account refers to the properties as that "which are entirely distinct from transportation property."
If entirely distinct from transportation property, although the carrier may operate the property it would not be classable as transportation property.

Mr. Funkhouser: I move to strike out the answer as nonresponsive and evasive and I want to ask the Examiner to direct the witness to answer my question, please.

Examiner Walton: The Examiner is not satisfied that it [fol. 214] was non-responsive and he will, therefore, deny the motion, but you are entitled to an answer to the question and if it has not been fully given, Mr. Barnes, we would like to have an answer given. Do you want the question read again?

The Witness: I would like to have it.

(The reporter again read the question as above recorded.)

Mr. Hays: Mr. Examiner, it occurs to me that the answer of the witness to that question is comprehensive and complete.

Mr. Funkhouser: Are you overruling the Examiner on that?

Examiner Walton: Unless there is objection the witness should proceed to answer it.

The Witness: The text of the account—the classification of coal and other mines which are entirely distinct from transportation property——

By Mr. Funkhouser, interposing:

Q. Please read the rest of that sentence there and not stop there, but go ahead literally with the rule.

A. And are not operated in connection with transportation of the company——

Q. (Interposing.) Right there. So that expression "and are not operated in connection with the transportation service" is included in the rule 705, is it not? It either is or is not. Please state whether or not it is.

[fol. 215] The Witness: Those words appear in the text and it was so stated in my previous answer.

By Mr. Funkhouser:

Q. Aren't the three mines of the carrier, Howard, Pond Creek and Vulcan, operated in connection with the transportation service of the Norfolk & Western?

A. It is my understanding that the products of the mines are used by the Norfolk & Western for its transportation operation.

[fol. 216] Q. Do you know whether or not the mines are operated and not the product of the mines in connection

with the transportation service of the Norfolk & Western?

A. Not in my opinion, they are not?

Q. What is the basis for that opinion?

A. The transportation service of the Norfolk & Western Railroad Company is an interstate operation. The operation of the mines is an intrastate operation.

Q. So, then, you state as the reason for your opinion that these mines are not operated in connection with the transportation service of the Norfolk & Western is because the Norfolk & Western is an interstate carrier and the mines are located in one state and do not partake of an interstate nature. Is that correct?

A. The operation of coal mines is never an interstate operation, as I understand it.

Q. You have not answered my question, again, Mr. Barnes. I have asked you if that is the basis of the distinction you make, because the mines partake of an intrastate business and the carrier partakes of an interstate business, is that the basis for the distinction you make?

A. I gave you the general answer, that the operation of coal mines is not an interstate operation. It applies to the Norfolk & Western and all coal mines.

Mr. Funkhouser: If the Examiner please——

[fol. 217] Examiner Walton (interposing): It seems to the Examiner you could answer that last question by stating whether or not the matter stated by Mr. Funkhouser is the basis for your opinion.

The Witness: Read the question again.

(The reporter read the question as follows.)

"Q. So, then, you state as the reason for your opinion that these mines are not operated in connection with the transportation service of the Norfolk & Western is because the Norfolk & Western is an interstate carrier and the mines are located in one state and do not partake of an interstate nature. Is that correct?"

The Witness: That is one reason.

By Mr. Funkhouser:

Q. All right. Please give your other reasons.

A. The other reason is that the operation of the mines is not a transportation operation.

Examiner Walton: He is asking you the reason for that conclusion. That does not elaborate sufficiently.

The Witness: The mining operations——

By Mr. Funkhouser, interposing:

Q. What page is that? What section of the act? What is it you are reading from?

A. From the Interstate Commerce Act.

Q. What section, please?

A. I was simply using the language here without intending it as a quotation.

[fol. 218] Q. May I look at the section to which you refer?

A. Certainly. It is section 1.

Q. If you will call my attention to the paragraph I would appreciate it.

A. Transportation as used in paragraph 1 (a) refers to the transportation of persons and property wholly by railroad or partly by railroad and partly by water. This operation is not a transportation of passengers or property by steam railroad. The class of carriers to which the accounting rules, under which the accounts of the Norfolk & Western Railroad Company are required to be kept, as provided by the Commission.

[fol. 219] Mr. Funkhouser: Here is what I am after, Mr. Examiner. I am not sure the Examiner has it clearly. As I understand the record, Mr. Barnes has stated the coal mines of the Norfolk & Western Railroad Company are not operated in connection with the transportation service of the Norfolk & Western Railroad Company, and I have asked him to give his reasons for that conclusion. The first reason he gave was that the mines partook of an intrastate nature and the carrier did an interstate business. That was reason No. 1. He said there were other reasons. I have asked him what they were and he made some answers there and I have then asked him if those answers are his other reasons to which he referred, and I would like to know now, Mr. Examiner, whether that is corerct.

[fol. 220] Examiner Walton: The answer given by the witness has cleared up the situation in the Examiner's mind, but the only way to clear up the situation, apparently, is for the witness to state now to what his reasons relate.

The Witness: My reasons for the conclusion that these mines should be included in account 705 and not in either account 701 or 702 was because they are not used for transportation service. I did not say, as the attorney quoted me as saying, that my reason was they were not used in connection with the operation of the Norfolk & Western Railroad Company. I never said that.

By Mr. Funkhouser:

Q. Then, Mr. Barnes, I do not want to misquote you, and if I have I beg your pardon, so I am going to ask you now whether or not, in your opinion, the three mines of the Norfolk & Western Railroad Company are or are not operated in connection with the transportation service of the Norfolk & Western Railroad Company?

A. To an extent they are; to the extent that the railroad transports supplies for the mines; to the extent that the railroad performs service for the mines. In my opinion, the operations are not in connection with the operations of the railroad for the reason that the railroad operations are transportation operations and the operations of the mines are not transportation operations, although the products of the mines are consumed by the railroad in its operation.

[fol. 221] Q. Then I will ask you this further question, since you have stated, if I quote you correctly, that, to an extent, these mines are operated in connection with the transportation service of the Norfolk & Western Railroad Company, how could you, then, with that conclusion, include them in Account 705, because the account expressly states that it is to include property not operated in connection with the transportation service.

A. The first provision of the text of this account reads as follows:

"This account shall include the accounting company's investment in physical property other than transportation property assignable to accounts 701 and 702."

That is positive that such property must be excluded.

Q. Right there, if I may interrupt you, you just read "other than transportation property."

A. Yes, sir.

Q. Doesn't your answer beg the whole question because isn't this an inquiry to determine whether or not this is transportation property?

A. I am not attempting to decide the case. I am giving my opinion of the subject and the intent of the classifications when they were written by myself.

[fol. 222] The Witness: Were it not for the provision with regard to the operation in connection with transportation service certain classes of transportation property would be includable in this account. For instance, rails and other track material is excluded.

The classifications indicate clearly the classes of property which are includable in Accounts 701 and 702. This account is designed to describe the account in which prop-

[fol. 223] erty not includable in accounts 701 and 702 shall be included.

By Mr. Funkhouser:

Q. Mr. Barnes, you just read a part of that classification of 705, but you did not read the whole thing. You read as follows:

"This account shall include the accounting company's investment in physical property other than transportation property assignable to accounts 701 and 702," and as I recall, you stopped right there. But the classification goes on and says: "including hotels, restaurants, commercial power plants, etc., which are entirely distinct from transportation property and are not operated in connection with the transportation service of the accounting company."

You have just testified that, in your opinion, the mines of the Norfolk & Western are partially operated in connection with the transportation service of the Norfolk & Western and I have asked you——

A. (Interposing.) Mr. Examiner, I take exception to that quotation. I didn't make that statement.

Examiner Walton: Proceed.

By Mr. Funkhouser:

Q. I asked you, holding that conclusion, how can you put the mines in account 705?

A. Am I still answering?

Examiner Walton: You may answer the question and point out any exception you have to the quotation by Mr. Funkhouser.

The Witness: Mr. Funkhouser, may I again read the [fol. 224] text of this account and explain the application? It seems to me it will clear the record.

The Witness: The important section in that section is this:

"This account shall include the accounting company's investments in physical property other than transportation property assignable to accounts 701 and 702."

That is the general statement. It indicates the items such as hotels, restaurants, commercial power plants, which are entirely distinct from the transportation property and not operated in connection with transportation service are a part of the properties which shall be included in account 705, but the important part of the construction is that requiring to be included in this account items which are not includable in Account 701 or 702.

By Mr. Funkhouser:

Q. So you have said, Mr. Barnes, as I understand it, the important part of this classification is the first part of the classification and you thereby omit as non-important that part which says "properties not operated in connection with transportation service." By what right or authority do you take the first several lines of the classification and call that important and omit the exception included in the same [fol. 225] classification?

A. Mr. Examiner, I did not say "properties." I didn't use the term "properties."

[fol. 226] The Witness: The second portion of the text is explanatory.

Examiner Walton: That, in part, is an answer to your question.

By Mr. Funkhouser:

Q. And that is the reason you call the first part important and impliedly say the last part is not important? Is that correct?

A. I have made no such suggestion. They are all important for the purpose for which they are written.

Q. You have said the first part was the important part. How do you regard the last part?

A. I said the first part was the essential part.

Q. I beg your pardon. My recollection, if it is correct, is that you used the word "important." The record will show. [fol. 227] A. The word "essential" should be—"the more important"; I should have used that term.

Q. More important. Then you would say the latter part, including the phrase which has been referred to so often here this morning, is less important? Is that correct?

A. I would say that that is important. I consider they are all important for the purpose for which they are indicated by the form of the text.

Q. Then you say that the last part is just as important as the first part, do you, or do you not?

A. I say they are all important for the purpose for which they were designed in the text.

Q. Isn't the classification known as 705 set forth in five printed lines with one word, the word "company" on the sixth line? And haven't you said the first part of those five lines are important or more important and, thereby saying that the latter lines of the five lines are less important?

A. Possibly I can make it clear to you in this way.

Q. All right, sir.

A. The first portion of it definitely is a general statement of the intent of the account.

The second portion is explanatory in that it is illustrative and further down are given items of investment, which are typical items and are for the guidance of the accounting officer. In other words, if this property were used or a [fol. 228] property may be used in connection with the transportation operations of a carrier and still be includable in account 705 for the reason that the property is excluded from account- 701 and 702 by the text of those accounts and the related text.

Q. But you have said, Mr. Barnes that you considered the mines of the Norfolk & Western partly operated in connection with the transportation service and my question directed to you is with that conclusion how can you put the mines under account 705?

A. The general instructions of the classification of investment in road and equipment, Section 1, contains this statement:

"The accounts prescribed in this classification are designed to show the investment of the carrier in property devoted to transportation service."

Q. All right. Take that definition. You shifted from one rule to another, but you have testified, in your opinion these mines were partly operated in connection with transportation service of the Norfolk & Western. Now, how does this second rule from which you have just quoted help you after the conclusion you have stated?

A. I think, again, the record will not show I have stated that these mines were operated in connection with the transportation service. I said the product of the mines was used in transportation service. The operations of the mines are entirely distinct from transportation operations.

[fol. 229] Mr. Funkhouser: Mr. Reporter, and Mr. Examiner, I am going to ask the reporter to find where Mr. Barnes has stated what I quoted him as saying.

(Discussion off the record.)

Mr. Funkhouser: I am going to ask the reporter to go back and find that, and I am going to ask for a five or ten minute recess, for my conviction is that Mr. Barnes testified directly and the record will show it, that to some extent or partially—I do not know exactly what words he used—the mines were operated in connection with the transportation service of the Norfolk & Western.

(The reporter read as follows:)

"By Mr. Funkhouser:

"Q. Then, Mr. Barnes, I do not want to misquote you, and if I have I beg your pardon, so I am going to ask you now whether or not, in your opinion, the three mines of the Norfolk & Western are or are not operated in connection with the transportation service of the Norfolk & Western?

"A. To an extent, they are; to the extent that the railroad transports supplies for the mines; to the extent that the railroad performs service for the mines. In my opin-

ion, the operations are not in connection with the operations of the railroad for the reason that the railroad operations are transportation operations and the operations of the mines are not transportation operations, although the [fol. 230] products of the mines are consumed by the railroad in its operation.

"Q. Then I will ask you this further question, since you have stated, if I quote you correctly, that, to an extent, these mines are operated in connection with the transportation service of the Norfolk & Western Railroad Company, how could you, then, with that conclusion include them in Account 705, because the account expressly states that it is to include property not operated in connection with the transportation service?

"A. The first provision of the text of this account reads as follows:

" 'This account shall include the accounting company's investment in physical property other than transportation property assignable to accounts 701 and 702.'

"That is positive that such property must be excluded."

Mr. Funkhouser: Now, please read the last question and answer.

(The reporter read the last question and answer as follows:)

"Q. All right. Take that definition. You shifted from one rule to another, but you have testified, in your opinion, these mines were partly operated in connection with transportation service of the Norfolk & Western. Now, how does this second rule from which you have just quoted help you after the conclusion you have stated?

[fol. 231] "A. I think, again, the record will not show I have stated that these mines were operated in connection with the transportation service. I said the product of the mines was used in transportation service. The operations of the mines are entirely distinct from transportation operations."

Mr. Funkhouser: I will withdraw that last question and ask this:

Q. You just heard the record reread by the reporter, and you have heard him read your answer, which was to the

effect that you thought to an extent the mines of the Norfolk & Western were operated in connection with transportation service. I want to ask you again, with that conclusion of yours how can you put the mines in acccount 705?

A. The operations of the mines operated in connection with transportation operations of the railroad, is the service performed by the railroad for the mines in transportation. The rule that I just read prevents the inclusion of the mines in the road and equipment accounts for the reason that the property is not devoted to transportation.

Q. So, then, in your opinion the mines are, to an extent, operated in connection with the transportation service of the Norfolk & Western, but the investment in the mines is not devoted to transportation service. Please explain to me the difference between "operated in connection with transportation service", and the expression "devoted to transportation service."

[fol. 232] A. The mines, from the standpoint of my explanation of operation in connection with the service of the Norfolk & Western, are in the same position as any other mine on the road. The Norfolk & Western conditions service for the mines. To that extent there is a connection, but the operations of the mines themselves is entirely distinct from transportation service.

Q. But you have stated that, to an extent, they were operated in connection with transportation service. Now, you say they are entirely distinct. How do you reconcile those two statements?

A. For the same reason that the mines of any other company would be operated, while operating in connection with the operation of the Norfolk & Western would not be classable as transportation operations. There is no part of the operation of those mines in the mining of coal that is a transportation operation as defined by the act.

Q. So you compare these mines, then, do you, and you draw your conclusions as you do because you say they are in the same position as to the Norfolk & Western as to any other mines along its line owned by other companies.

A. I use that as an illustration of the extent to which the transportation operations of the Norfolk & Western related to the mines.

[fol. 233] The Witness: The mining of coal neither by the Norfolk & Western nor other coal mining industries along

the line is a transportation industry, and it is not includable, therefore, in either account 701 or account 702.

Q. You draw that conclusion for the reasons you have heretofore given. Is that correct?

A. I draw that conclusion for the reason that it is not a transportation service. That, alone, I consider to be adequate; entirely so.

Q. You mean that reason?

A. That reason alone I consider entirely adequate for the classification of that property as non-transportation property under Account 705.

Q. What do you mean by "that alone"? To what do you refer?

A. I mean that reason alone.

Q. What is that reason?

A. Because the operations of the coal mine are not a transportation service.

Q. You give that as the reason, although, as you have heretofore stated the mines are, to an extent, operated in connection with the transportation service. Is that correct?

A. I made the statement the operations of the mines involve transportation operations by the railroad in carrying material and supplies.

[fol. 234] Q. What transportation service does the Norfolk & Western perform for the Vulcan and Pond Creek Collieries?

A. My answer to that must be based upon the impression which I have from inquiries of the employees of the Norfolk & Western Railroad Company to the effect that that road does transport property for the use in the mines. It transports supplies for the stores and it transports men who operate the mines. As to where the basis on which those transportation operations are carried, I do not know. My understanding is that a part of them are charged for at the tariff rate and the other movements are free movements. I was only referring to the service which is actually performed.

Q. That is the reason you say that, to an extent, they are operated in connection with the operation service of the Norfolk & Western, because they carry supplies and men to the mines. Is that correct?

A. The intent of my answer is this, that there is a connection between the operations of the mines and the operations of the railroad. That is all I have intended to say, and to the extent that the railroad performs service in transporting men and materials, it is performing a service in connection with the operation of the mines.

Q. Does the Norfolk & Western perform any services in transporting men and materials for its own mines that it does not perform for the other mines that are located solely [fol. 235] on the Norfolk & Western Railroad?

A. I could not say it did. I do not think it does. I think there is a connection between the two operations, not only the Norfolk & Western, but with other mines.

Q. Why, then, would you classify mines not owned by the Norfolk & Western as operated to an extent in connection with the transportation service of the Norfolk & Western; because of that service to which you refer being performed?

A. I think there is a connection between the operations of the mines along the line and the Norfolk & Western operation.

Q. So, then, you would say the mines along the line are operated in connection with the transportation services of the Norfolk & Western just the same as the mines of the Norfolk & Western Railroad, would you not?

A. No, I would not.

Q. Then, what is the distinction between the two?

A. In one case the Norfolk & Western would charge tariff rates for all the work it did. In the other case it performs the service without a distinct charge.

Q. So, then, the difference between the two is whether or not there is a tariff covering the material and men hauled. Is that correct?

A. No, that is not correct.

Q. If that is not correct, what is correct?

A. I said there was a difference between the two.

[fol. 236] Q. And the difference was that they charged the tariff rates to the outside mines and did not charge the tariff rates to the Norfolk & Western mines?

A. That is one difference.

Q. That is one difference. So that is the reason for your statement that these mines of the Norfolk & Western are, to an extent, operated in connection with the transportation

service and the mines of the other owners are not operated in connection with transportation service?

A. My intent in the answers was this, that the two operations connect with each other, the mines along the line, and the transportation operations of the railroad, but I would like to make it particularly clear that I have not intentionally said at any time that the operations of the mines of the Norfolk & Western was a transportation operation or service.

Q. Didn't you just hear the reporter read your language in which you said that, to an extent, you considered, or, in your opinion, the mines of the Norfolk & Western Railroad were operated in connection with the transportation service of the Norfolk & Western Railroad?

A. I explained that it is more particularly the operations of the Norfolk & Western Railroad in connection with the operation of the mines rather than the reverse.

Q. You are changing your position, aren't you?

A. Not at all.

[fol. 237] Q. So now you say that the Norfolk & Western is operated in connection with the mines. Is that correct?

A. A portion of the operations of the Norfolk & Western in transportation service is in connection with the service for the mines, yes, sir.

Q. All right. So, as I understand it, and let us get it clear, your position now is that a portion of the service, transportation service of the Norfolk & Western, is operated in connection with the mines. Is that correct?

A. Yes, the transportation of supplies, of provisions, etc., for the stores, and the transportation of employees for the mines by the Norfolk & Western Railroad is in connection with the operations of the mines and for the benefit of those operations.

Q. So you do not think, then, that the mines of the Norfolk & Western are, to an extent, operated in connection with the transportation service of the Norfolk & Western Railroad?

A. I think the Norfolk & Western Railroad is operated in connection with the mine service, to an extent.

Q. And the Norfolk & Western Railroad is operated in connection with the mine service of mines not owned by the railroad, too, is it not?

A. Yes, surely.

Q. Is the Norfolk & Western Railroad operated any more in connection with its mines than it is in connection with [fol. 238] mines along its line not owned by the railroad?

A. I would not say so, no. I could not say. Not having a definite knowledge of just what the Norfolk & Western Railroad does for the mines I can not answer that positively. I am only answering it with the knowledge that the Norfolk & Western does perform service for the mines.

Q. So what, in your opinion, is the test of whether or not these mines owned by the Norfolk & Western should be considered transportation property or non-transportation property? Is it the service the railroad performs for the mine or some other test?

A. The service the railroad performs for the mine is a transportation service.

Q. That should be the test; am I correct, in whether or not the mine should be classified as transportation or non-transportation?

A. But these operations——

Q. (Interposing.) Please answer my question. You keep sidetracking it.

Examiner Walton: Answer that last question.

The Witness: The test is as to whether the operations of the mines are transportation services or not. The opera- [fol. 239] tions performed by the railroad for the mines are a straight transportation service, but it does not have to do with the direct operation of the mines.

[fol. 240] By transportation operations with respect to the Norfolk & Western Railroad there is includable the operations of transporting passengers and property. The operations of the coal mines are not of such character and should, therefore, be classified as non-transportation operations, and the investment therein should be included in account 705.

By Mr. Funkhouser:

Q. Now, from that answer, Mr. Barnes, I understand the test you laid down is whether or not the operation is transporting passengers and property. Is that correct?

A. Yes, sir.

Q. So if some operation is not actually transporting

property and passengers where would you classify that? As non-transportation service?

A. I can not answer unless you give me a specific service.

Q. Let me try it again. You laid down the test as to whether or not the operation is the transportation or, as you said, in transporting passengers and property. Where would you classify other operations than the two named, to-wit, transporting passengers and property?

A. According to their character.

Q. Then do I understand you to admit that some operations of a railroad may be transportation service although [fol. 241] it is not the transporting of passengers and property?

A. Yes, sir.

Q. Then your definition you gave a moment ago was incorrect, was it not?

A. It had to do with this particular operation. My answer is related to that and that only.

Q. To what particular operation?

A. Coal mining operation.

Q. A coal mining operation is not the transporting of passengers and property, is it?

A. It is not.

Q. So, therefore, a coal mining operation would be considered as non-transportation property under your definition, would it not?

A. Yes, sir.

Q. Do you consider your definition a correct one?

A. I do with regard to the coal mines, yes, sir.

Q. For that reason you would classify it as non-transportation property?

A. That is correct.

Q. Where would you classify water stations?

A. I would classify water stations as transportation operations.

Q. Does the furnishing of water to water stations come [fol. 242] within your definition of transporting passengers and property?

A. It comes within the definition of——

Q. (Interposing.) Please answer the question. I know where it is in respect to the book, and I am going to ask you to please answer these questions.

Examiner Walton: Answer the question, if you understand it.

The Witness: It does not.

By Mr. Funkhouser:

Q. It does not. Then, is your classification correct, or incorrect of water stations?

A. It is correct.

[fol. 243] Q. You have just stated you would classify water stations as transportation property and you just laid down the test of what is or what is not transportation property, of whether or not it is transporting passengers and property, and you have just stated that a water station is transportation property. I have asked you, does it come within the designation you have just given? A moment ago you answered that it did not. Isn't that correct?

A. That is correct.

Q. How do you reconcile those two answers?

A. I reconcile those answers by the instructions in the general classification of investment in road and equipment.

[fol. 244] Q. Please explain how you can classify the water stations as carrier or transportation property under the definition of transportation operations that you have just given?

A. I can not answer that yes or no. The definition which I gave related to an opinion as to the classification of coal mines at the end of this hearing. This question, as I understand it, has to do with the classification of water stations under the present classifications.

Q. It is a classification of water stations under the definition given by you of what was transportation and what was not transportation service, and the question sets out exactly what I mean. If you do not remember it I will ask the reporter to read it again.

A. No. I understand it.

Q. All right.

A. The furnishing of water and coal to a locomotive are closely associated with the transportation service. They are very closely incidental to the inclusion of the water stations as transportation facilities, and it is a practice of very long standing. It is a practice that produces accounts which are useful to the carrier. It would be very [fol. 245] difficult to separate such operations from trans-

portation operations. The water stations are usually located upon the right of way of the carrier. They are so closely associated with the transportation facilities that a separation is impracticable.

Q. So, under what you have just said, the fact that a water station is located on the right of way affects whether or not it is transportation or non-transportation property?

A. That is one of the reasons, that the water stations usually are located on the right of way.

Q. Does that have anything to do with whether or not it is transportation or non-transportation property?

A. It has a great deal to do with the classification in the Commission's accounting rules and in the practice of the carriers long before the Commission had jurisdiction.

Q. And that is its location on the right of way?

A. That is one of the factors.

Q. How about a pump house which may be a half mile from the right of way? Is that classified as transportation or non-transportation?

A. That is transportation, yes.

Q. So, then, its proximity physically to the right of way is really not the test?

A. Not the only test, no, but the fact that water stations are usually upon the right of way and have been classified as transportation property for so many years was the [fol. 246] cause for inclusion in the accounts of the Commisson.

Q. Its physical location is one of the tests. Isn't the main test the use to which the property is put?

A. I can not say that that is true. If it were not used for the furnishing of water for the use of locomotives, of course, or in connection with operations, it would not be transportation property at all.

Q. Although it was located on the right of way?

A. That is true.

Q. Then under the definition you have just given the real test there is use and location, is it not?

A. I think that is one of the reasons for the classification. Precedents and practices have a great deal to do with the classification.

Q. Is that one of the tests used by the Commission in classifying property either as transportation or non-transportation? I mean precedent?

A. It had a great deal to do with it, yes, sir.

Q. Doesn't the Interstate Commerce Act require that property which is used and useful in the transportation service shall be known as transportation property, classified as transportation property?

A. I recall no such requirement in the act.

Q. How, in your opinion, should coaling stations be classified?

A. Are you going to the present classification?

[fol. 247] Q. I am asking you what the proper classification is and then I will ask you how it should be classified.

A. May I ask if you are talking about present accounting rules?

Q. No, I am not. I am asking you, in your opinion, as an accountant with years of experience, to which you have testified in this case, how should coaling stations be classified, transportation or non-transportation?

A. Transportation property.

Q. How are they classified under the present accounting rules?

A. Transportation property.

Q. On page 284 of the record you set forth in your testimony in chief——

A. (Interposing.) May I go back to that last question to ask if by coaling stations you mean the coal pockets that put coal on the locomotives?

Q. I mean what is known in railroad language as coaling stations.

A. There are other stations that are coaling stations but not for railroad use.

Q. I am talking about railroads.

A. I want to be sure of that.

Q. On page 284 of the record you set forth in your testimony in chief representative lists of classes of property known as transportation property and non-transportation property. In your list of transportation property you did not mention water stations and coaling stations. Why were [fol. 248] they omitted from your list of such properties?

A. I was not aware that they were omitted; probably through an oversight.

Q. They were not omitted intentionally?

A. No.

Q. Under the present classification both the water stations and coaling stations are classified as transportation properties?

A. Yes.

Q. How are tie-treating plants classified?

A. They are classified as transportation property provided the product is used by the carrier.

Q. In what account?

A. Tie-treating plants?

Q. Yes. Just withdraw that question.

A. It is somewhere in there.

Q. How are timber-preserving plants classified?

A. If operated for the carrier's own maintenance or construction, as transportation property.

Q. How are water-purifying plants classified?

A. As transportation property.

Q. How are electric power plants classified?

A. As transportation property provided that they are used in connection with the carrier's own transportation service. Otherwise, they fall within the accepted class re- [fol. 249] ferred to as hotels and restaurants which are distinct from the carrier's transportation plant and not used in the transportation service.

Q. So, then, for instance, for an electric power plan- the test of whether or not it is transportation property is whether or not it is used in the service of transporation, is it not? Isn't that correct?

A. Yes, sir.

Q. Isn't that the real test that is used in the classification of all these things I have mentioned, all of these properties I have just enumerated to you and about which you have been talking?

A. Yes, to the best of my recollection that is so.

Q. The Bureau of Accounts or the Commission, or whoever makes these classifications, could not apply one test to a power plant and another test to other property and by the test I mean the test of whether or not it is transportation or non-transportation. Isn't the same test applied to all the property?

A. Not exactly the same test, no. In the text of this account we quoted this morning there is a test with regard to hotels, restaurants and power plants.

Q. Yes.

A. If they are not treated as transportation—they are not to be treated as transportation property when they are [fol. 250] entirely distinct and not used in connection with the transportation operation of the carrier.

Q. That is the same test that you just applied to electric power plants, is it not?

A. The hotels, restaurants and power plants are in the same class.

Q. Isn't that the test applied to all the property of a carrier whether or not it is transportation or non-transporation is whether or not it is used in the transportation operations of the carrier?

A. In connection with the transportation operations of the carrier. There are many expenses—there are revenues——

Q. (Interposing.) I am talking about the use now. Isn't that the test?

A. The expenses follow the use. That is why I explained——

Q. (Interposing.) I am asking about the property itself; not expenses. Please stick to the question.

A. Will you read that question?

(The reporter read the question as follows:)

"Q. Isn't that the test applied to all the property of a carrier, whether or not it is transportation or non-transportation is whether or not it is used in the transportation operations of the carrier?"

The Witness: That is, whether it is used directly in connection with the transportation operation of the carrier, [fol. 251] yes, sir.

By Mr. Funkhouser:

Q. Isn't that a different test from the one you laid down previously, to-wit, transporting passengers and property?

A. That test was applied by me only to the classification of coal mines, not to the accounts themselves. That was sufficient for that purpose.

Q. So do you think a different test should be applied to the coal mines from other property used in the operations, in transportation operations by the carrier?

A. That is an impossible question to me, for I know of no coal mines that are used in the transportation operations of the carrier.

Q. Didn't you say this morning, in effect, that to a certain extent the Norfolk & Western Railroad coal mines are operated in connection with the transportation service?

A. I said that the operations to an extent were connected, but even if they were under the accounting rules, were they connected more intimately under the provisions of account 705, the mines would be still classified under that account.

Q. It is your opinion that the same test should be applied to coal mines as to other property in order to determine whether or not they are carrier or non-carrier property?

A. In my opinion the test is as to the operations and not the property itself.

Mr. Funkhouser: But you have not answered the question.

[fol. 252] Examiner Walton: That does not answer the question, Mr. Barnes. The question is as to the identity of test on these particular properties.

The Witness: What is the question?

(The reporter read the question as follows:)

"Q. Is it your opinion that the same test should be applied to coal mines as to other property in order to determine whether or not they are carrier or non-carrier property?"

The Witness: Not the identical test, no.

By Mr. Funkhouser:

Q. What test should be applied, generally, to the property of the carrier to determine whether or not it is transportation or non-transportation property?

Examiner Walton: That is repetition.

Mr. Funkhouser: He says he distinguishes now between the two tests, as to coal mining property and other property. I want to know what test is generally applied and then I want to know what test should be applied to the coal mines.

Examiner Walton: Very well.

The Witness: The test of transportation property must be that it is used in connection with the maintenance of the transportation plant or in the operations of transporting passengers and freight.

By Mr. Funkhouser:

Q. That is the test you use generally to determine whether property is transportation or non-transportation property, is it not?

[fol. 253] A. I would say so, yes, sir.

Q. What tests would you apply to determine whether or not a coal mine is transportation or non-transportation property? I mean the coal mining property?

A. I can not conceive of a test that would make it transportation property. It is entirely distinct from transportation operations.

Q. So, then, am I to understand you would say you apply no test to coal mining properties?

A. I would apply the test.

Q. What test?

A. The test is that it is entirely—the test, which, to my mind, makes it non-transportation property is that it is the operation of coal mines. The coal mines are not incident to transportation.

Q. What test have you applied in reaching your decision that coal-mining properties of a railroad are non-transportation property? What I want is for you to state the test you apply before you decide the case.

A. The test would be, first, to determine whether it was a transportation operation. That is the general test.

Q. You would apply the general test, would you not?

A. And if not, whether it was generally and intimately connected with transportation service.

Q. Isn't that the same test you would apply to any property?

[fol. 254] A. No. There are other tests. If the property is remote from the transportation plant, entirely distinct from it, that would be a test of great importance.

Q. You mean whether it is physically near?

A. Whether physically distinct.

Q. How about, as I asked you a moment ago and you answered it—you said a pumping station a mile away from a railroad would be transportation property.

A. Under the classification.

Q. So that, then, the physical proximity to the right of way is not the test, is it?

A. There is no mathematical test by which any system of accounts can be drawn.

Q. I am not asking you about a system of accounts. I am asking you about the classifications of transportation and non-transportation property. You have given the test whereby property generally is classified and you made a distinction between the classification of property, generally, and coal mines, and I have asked you what test you would apply to coal mining property in order to classify it and that is all the answer I desire. Will you give the answer?

A. Did you get the answer? I think I gave an answer to that.

Examiner Walton: Are you satisfied, Mr. Funkhouser?

Mr. Funkhouser: No, sir, I am not, Mr. Examiner. I would like to have it answered.

[fol. 255] Examiner Walton: Answer it again or answer it more fully, as the case may be.

The Witness: Just read that question.

(The reporter read the question as above recorded.)

The Witness: One test would be as to whether the coal mines were distinct from the transportation plant of the carrier.

Another test would be as to whether the operations of the coal mines themselves are transportation operations.

By Mr. Funkhouser:

Q. Isn't that just what we are trying to determine, whether or not it is a transportation operation, and I am asking you to give me the test to determine that fact.

A. Are you talking to the present—I do not understand him, Mr. Examiner.

Examiner Walton: Here is what he asked you; how do you determine what is a transportation operation.

The Witness: I do not know whether he is talking about—whether he is asking for my judgment or the accounting rule.

Mr. Funkhouser: I have not said anything about the accounting rule at all. I am asking your judgment. You stated your judgment of what the test should be for property, generally.

The Witness: Yes.

Mr. Funkhouser: I have asked you about coal mines and you know it is your judgment or you should know it from all these questions we have had here.

[fol. 256] The Witness: Mr. Examiner, if the attorney will keep his question as to whether he is referring to the present classification——

Mr. Funkhouser (interposing): I have said nothing in the world about the present classification.

The Witness: But he shifted back to it a short time ago.

Examiner Walton: In answering you can make it clear as to what you are referring to.

The Witness: What is the answer I gave there?

Examiner Walton: Without bothering to reread the record.

Q. The last question of counsel as to how you determine whether or not a particular operation is transportation, and if you desire, you may state in connection with the answer whether it is under the classification of accounts or in accordance with your own opinion solely. That will limit the effect of the question.

The Witness: If you will give me that question I will answer it.

Examiner Walton: The question is how do you determine what is a transportation operation.

Mr. Funkhouser: As to coal mining property.

Examiner Walton: No. The question was general.

Mr. Funkhouser: He has already given a general rule, Mr. Examiner.

(Discussion off the record.)

[fol. 257] Examiner Walton: You may have the answer either way you like, Mr. Funkhouser, to the general interrogatory or specifically as applied to coal mines.

By Mr. Funkhouser:

Q. Here is the question I desire to be answered and I will try to make it as plain as I can. I would like for the witness to give me the test he applies to determine whether or not the coal mining property is transportation or non-transportation property. Could anything be plainer than that?

A. I will give it first under the accounting rules.

Q. No. I want in your opinion. That is what I desire, and from your knowledge, the test of what should be applied. That is what I am asking for.

A. One of the first tests would be as to the effect of classifying coal mining operations in the accounts of the carriers, as to whether it would destroy the comparability between the carriers; as to whether it would require the creation of additional accounts for operation; as to whether the inclusion of accounts for coal mining operations in the transportation accounts of the carrier would afford a ready means for the carrier to account for operations which are imprudent and unduly burdensome upon the public in such a manner that the facts were not readily determinable; would it destroy comparisons between the accounts of carrier as to the costs of fuel used for transportation purposes; would it tend to deceive the carrier itself as to the results which [fol. 258] it is accomplishing from its operations.

These are a few. I do not recall them all. There are many other reasons.

Q. Those would be the tests you would apply to determine whether the coal mining property should be classified as carrier or non-carrier. Is that correct?

A. Those are among the tests, yes, sir.

Q. Why should a different test be given an electric power plant than is given to a coal mining property in determining its classification as transportation or non-transportation property?

A. Largely the same test should be applied.

Q. But, Mr. Barnes, you have just set forth here one test to apply to property, generally, and you have set forth a different test to apply to coal mining property. Have you any authority for making such distinction?

A. I have not intentionally made such a distinction that you refer to.

Q. So then do I understand you to say the test is the same that should be applied to property generally of a carrier and

should also be applied to a coal mine to determine whether or not it is transportation or non-transportation property? Is that true?

A. The facts to be considered in the test are practically [fol. 259] the same, yes.

Q. Practically the same?

A. Yes.

Q. And in determining whether or not the property was transportation or non-transportation property you would consider whether or not it would destroy the comparability of the accounts and whether or not it would create additional accounts for operation and whether or not it would be improvident or unduly burdensome upon the public and whether or not it would destroy comparisons as to the fuel prices? Is that correct?

A. Yes, sir.

Q. Now, I believe you stated that you would classify an electric power plant as transportation property, did you not?

A. Yes, sir.

Q. Do you apply those tests in classifying an electric power plant as transportation property?

A. Usually the first test is applied, that is, whether it is distinct from other property. One of the tests you did not mention.

Q. You did not give that the last time.

A. Yes, I did. I made it as distinct. The property is distinct from transportation property.

Q. In other words, you mean whether it is physically distinct?

A. Yes.

Q. That is what you mean?

[fol. 260] Yes, sir.

Q. Do you mean whether or not it is physically connected with the transportation right of way?

A. Whether it is on the transportation right of way.

Q. Suppose a power plant is five miles off a right of way, is that transportation or non-transportation property?

A. It is dependent entirely upon its use.

Q. Suppose it is used by a railroad company, is it transportation or non-transportation property, and is five miles away from the right of way?

A. If it is used for transportation purposes it is transportation property.

Q. Wouldn't you say an electric power plant five miles from a right of way is distinct from the transportation property?

A. No, I would not.

Q. You said a moment ago, as I understood you, by "distinct" you meant whether or not it was physically connected.

A. I said so.

Q. Didn't you?

A. Yes, sir.

Q. All right. Is not an electric power plant five miles from a right of way physically distinct from the transportation property?

A. Not to my knowledge.

Q. What do you mean by "distinct"?

[fol. 261] A. I mean it is distinct from other property. The electric power plant with feeder lines is all one unit, practically. You must transport the electricity over the carrier's lines, but so far as the classification of electric power plants as transportation facilities is concerned or transportation property, the same precedent is applied to that that applies as a test in classification of all property that is used directly in producing transportation service.

Q. I think you just stated what I have been after all the time. Isn't the test whether or not property is transportation or non-transportation whether or not it is used and useful in the transportation operations?

A. Not for accounting purposes, no.

Q. I am talking for purposes of classification.

A. That is what I am speaking of, classification.

Q. Please state what the true test is.

Mr. Hays: Mr. Examiner, I object to that question because it is endless repetition. This witness has stated as many as 7 or 8 times different rules or tests that should be applied, according to circumstances, and this question implies a re-answer to the same question he has repeatedly answered heretofore.

Examiner Walton: The Examiner is inclined to agree with that but has no desire to foreclose Mr. Funkhouser and, therefore, will overrule the objection. He may answer.

[fol. 262] The Witness: There is no single test. I tried to give a combination of tests that are necessary. There is no single test that is adequate.

By Mr. Funkhouser:

Q. We do not seem to be getting anywhere along that line, Mr. Barnes, so I am going to go a little further. How should, in your opinion, gas-producing plants be classified?

A. If it be a producer gas plant used for producing gas for internal combus-ion engines and the plant is located on the property of the carrier, the gas is delivered to engines operated by the carrier, it should be classified as transportation property.

Q. Supposing the gas-producing plant is not located on the right of way of the carrier, how would it be classified, if the gas is used in the transportation operation?

A. Both that portion of the plant which is upon the right of way of the carrier and that which is off the right of way of the carrier, if the product of the plant be used exclusively in the carrier's transportation service, it should be included as transportation property.

Q. So then it does not make any difference whether the plant is located on or off the right of way of the carrier if the product is used in the transportation service. Isn't that true?

A. They are both tests.

[fol. 263] Q. Whether or not it is located on the right of way or off, if the product is used in the transportation service it would be transportation property, would it not?

A. Yes.

Q. Please distinguish between such a gas-producing plant and a coal mine and by "distinguish" I mean if such a gas-producing plant and the product is used in the transportation service and is transportation property why would not a coal mining property with the product used in the transportation service be considered transportation property?

Mr. Hays: Objection is made to the question because it is argumentative.

Mr. Funkhouser: I will withdraw the question because of the objection, and I will ask it in this form:

By Mr. Funkhouser:

Q. Please distinguish between a gas-producing plant and its classification and a coal-mining property.

A. The gas-producing plant, as is common with the power plants, the power plants in locomotives, and all other plants which are used for transforming into power a raw material that is used in connection with operations is a transportation operation. The property should be classified as transportation.

The mining and production of coal is the producing of a raw material and the manufacturing and delivering of it is an operation that is entirely distinct and does not come [fol. 264] within the jurisdiction of the Commission in any way except accounting.

In the classification of the production of power such as gas, electricity, steam, those are operations that have been performed for many years by the carriers and a precedent is well established for including such operations in the operating accounts for the transportation service.

The mining of coal by the carriers for its own purposes is a rare operation. It involves the use of many facilities. The facilities are of such character as not readily to be classified under the accounts suitable for transportation operations and the effect of including these operations in the accounts for transportation service would be to destroy the comparisons between carriers.

By Mr. Funkhouser:

Q. Mr. Barnes, are greenhouses classified as transportation property?

Mr. Hays: Mr. Examiner, I desire to interpose an objection to any further illustrative types of questions for the reason that this witness has already enumerated from half a dozen to a dozen rules and has stated that the application of those rules depends upon the particular circumstances and it does not occur to me that your Honor can be made clear on this situation by bringing in illus- [fol. 265] trations on the record which are, obviously, not

similar to the proposition at issue, to-wit, coal mining properties.

Examiner Walton: I am inclined to sustain that objection. I believe we have enough illustrative matter in the record.

Mr. Funkhouser: Mr. Examiner, these are really more than illustrations because they go to the very fundamental reasoning and philosophy of the classification of property and the reason I am bringing this out is that later on in our argument, if there is oral argument, and in the brief, I am going to show that the reasoning for the classification of these properties I have been talking about and the coal mining properties, is the same. The use is similar and that if one is classified the same test should be applied under the law, as I understand the law, to all, and it goes further than just an illustration and, furthermore, this witness has testified as an expert on how these things should be classified and has enumerated in his testimony years and years of experience as an expert and I am testing his reasoning powers on this thing, his knowledge of it, and I certainly think it is proper cross-examination when you consider his testimony in chief, and it seems to me this should be allowed. I am just about through; only one or two more questions and I know I have no more illustrations after these greenhouses.

Examiner Walton: That being the case, the objection is [fol. 266] overruled. Proceed. Read the question.

(The reporter read the question as follows:)

"By Mr. Funkhouser:

"Q. Mr. Barnes, are greenhouses classified as transportation property?"

The Witness: Under the condition that the greenhouses are located on the right of way, produce plants, shrubs, for use upon the transportation property, the greenhouses would be classified as transportation property.

Q. I wish you would please show me the authority for the statement that the greenhouses must be located on the right of way of the carrier.

A. I didn't say the greenhouses must be located on the right of way. I said if they were located on the right of way.

Q. Didn't you put that in as one of the conditions of its being classified as transportation property?

A. I was simply referring to one class of greenhouse. There are so many classes of greenhouses and your question is so wide that it is hard to know what to call it.

Q. Suppose the greenhouse is not located on the right of way of the carrier, does that fact determine one way or the other whether or not it is transportation property?

A. Not that fact alone, no.

Q. Is there any rule or order or classification that compels you in classifying greenhouses to consider that fact at all?

A. What fact, as to whether on or off the right of way?

[fol. 267] Q. Yes.

A. That would be one fact in considering it, yes.

Q. Please give me your authority for that statement. Please refer me to your authority or show me your authority. You have the books there before you.

Mr. Hays: May I ask whether that question is directed to the effect of the accounting rules or directed to the judgment of the witness?

Mr. Funkhouser: First I will ask as to the effect of the accounting rules.

The Witness: It may be proper to explain as to the accounting rules that the accounting rules are drawn with a knowledge of the practice of carriers in accounting, to a large extent. They were based upon those practices. The accounting rules were drawn for the purpose of guiding accountants and the intent of the accounting rules is well understood. There is no specific rule requiring that the greenhouse must be located upon the right of way.

By Mr. Funkhouser:

Q. Why do you answer to that effect?

A. Because your question applied to greenhouses, generally, and I answered as regards one particular class of greenhouses. Your question covers the universe, so to speak.

Q. All right, I am going to ask you, then, to refer me or to show me any rule or classification or order that requires or applies to or affects any kind of a greenhouse, whether [fol. 268] or not it is located on the right of way.

A. Account 35: "This account shall include the cost of all permanent structures not provided for elsewhere, including all furniture and fixtures to equip them for use."

Greenhouses located upon the right of way of the class I describe would be property used in connection with transportation service, would be located upon the transportation plant and would be classified in that account.

Q. You have answered my question by referring me to Account 35 entitled "Miscellaneous Structures." That account reads as follows:

"This account shall include the cost of all permanent structures not provided for elsewhere, including all fixtures and furniture to equip them for use."

Please tell me how that, in any way, refers to whether or not the property is located on the right of way of the carrier?

A. Correct the answer as to the account; Account 16, instead of what I gave you.

Q. In other words, do I understand you to say you did not mean to refer to Account 35, but you are referring to Account 16?

A. I should have referred to Account 16. Although there are greenhouses which might properly fall under 35, the greenhouses that are ordinarily located in connection with stations are included in Account 16.

Q. Will you please refer me in classification 16 to the [fol. 269] place where it says anything about the right of way, one way or the other?

A. The classification refers to land for transportation purposes. I referred to the greenhouse that was located on the right of way. I did not say that a greenhouse located off the right of way might not be classified as transportation property.

Q. Please state now whether it would be.

A. It would depend entirely on the use of it.

Q. So the test of its classification is its use, is it not, under your last statement?

A. I think so, under the classification, yes, sir.

Q. Isn't that the test that should be applied to a coal mining property?

A. As I said before, that would be one of the tests, yes, sir, but the prime test of all is this, the effect in the accounts

for comparative purposes and uniformity in accounting. That is the real test.

Q. Am I correct in understanding you to say that the real test or the prime test, as you said, is a question of accounting and not a question of use, whether or not it is used in the transportation service?

A. The use of all property has a bearing, yes. It is one of the factors.

Q. But it is not the prime or most impor-ant test, is it?

[fol. 270] A. The most important test is, in my judgment, as to whether the classification of the property in the accounts of the carriers will make the accounts more useful, whether the classification is fair and reasonable, and whether the classification will give the Commission the information and the carriers the information which they desire and require.

Q. So, then, it is a question of accounting largely rather than a question of use, for the prime test?

A. That is a very wide question. If a property is used for transportation purposes directly or in connection therewith it should be included as transportation property. If there is property that is distinct and the operations belong to an entirely different class of operation than transportation operations and the inclusion of the operation in the accounts of transportation would destroy the comparability of those accounts, in my opinion if the amounts are material it is impossible to exclude from the operating accounts of the carrier that non-transportation service. It can not be done. It is recognized by every accountant.

Q. From your answer, then, I do not quite—I would like to ask you this, which is the prime or most important test, those accounting questions to which you just referred or the question of the use to which the property is put in connection with transportation?

A. Those factors can not be considered——

[fol. 271] Examiner Walton (interposing): He asked you which is the most important.

The Witness: I can not compare those factors.

By Mr. Funkhouser:

Q. It is true, then, that you can not answer that question. Is that correct?

A. I didn't say that. I said I can not compare those factors.

Q. You can not compare those factors. I have asked you the same question about tie-treating plants, timber-preserving plants, water-purifying plants, electric power plants and gas-producing plants. Are these properties provided for in the present classification of road and equipment accounts as composite units of carrier property?

A. Gas-producing plants are and water-treating plants are referred to in the item lists. These item lists are given as a part of the classification for the purpose of clearly indicating the application of the accounting rules in specific cases. The lists in every case are to be considered as merely representative and not excluding from any account analogous items which happen to be omitted from the list appended.

Power plants are referred to.

I do not think tie-treating plants are given. Wood-preserving plants; the term, "Wood-preserving plants" appears in the classification. This would cover both tie and lumber-treating plants.

Q. I do not believe yet I have got an answer to my ques- [fol. 272] tion. My question is simple. I asked if these properties I have named, to-wit, tie-treating plants, timber-preserving plants, water-purifying plants, electric power plants and gas-producing plants, are treated in the present classification of road and equipment accounts as composite units of carrier property.

A. They are treated as property the cost of which is includable in the investment account, road and equipment.

Q. They are treated as composite units, aren't they?

A. I do not understand your term, "composite units." There are so many units I do not know what composite means as you are giving the term.

Q. Aren't they treated as single units or as a whole instead of splitting them into ties, rails, etc.? Aren't they treated as single units, or as a whole?

A. The cost of the plants is included in the investment account.

Q. Are they treated as single units or not in the accounts?

A. The expenditures for any part of it and every part of it are includable in the account.

Q. By that you mean the answer is "yes," isn't it, to my question, or is it "no"?

A. No, because I do not know what you mean by composite units without it being explained. There are so many meanings that can be applied to composite units. If you are talking about valuation that is one thing.

Q. Just assume we got a gas-producing plant belonging [fol. 273] to a railroad and the product of that is used in the transportation service, isn't that set up in the accounts as a unit, the gas-producing plant, or as a whole, or as one unit?

A. I think that is a valuation matter; that he is talking valuation language.

Q. I am talking accounts now. You are an expert. You have been in this game for a long time, according to your testimony.

A. Every dollar that is expended for that property is required to be included in the investment account for road and equipment.

Q. How is it treated, in one account or in dozens of accounts?

A. You have about half a dozen pieces of property. I can not answer all at one time.

Examiner Walton: He asked you concerning a gas-producing plant.

The Witness: Under some conditions it would be in one primary account and under other conditions it would be in two accounts, according to the class of plant.

By Mr. Funkhouser:

Q. What are those conditions?

A. Where the gas is delivered immediately at the plant, the Pintsch Gas Plant, the entire plant would be includable in Account 25, gas-producing plants.

Q. Suppose it were put in that Account 25, would not the gas-producing plant be treated as a unit in the account? [fol. 274] A. The account has only to do with dollars and cents and the entire cost of the plant itself would go in that account, but the product might be transported for power purposes and that portion for transporting of power be includable in some other account.

Q. I am not talking about the product. I am talking about the plant itself, how you set it up in your accounts. Would you not set up the whole plant into a unit instead of splitting it up into dozens of items?

A. Yes, I get your meaning now. I didn't understand your meaning before.

Q. Well, then, isn't that true?

A. Yes, sir, that is true.

The witness further testified as follows:

The same thing is true of a tie-treating plant, timber-preserving plant and electric power plant. There are plants that are treated as a unit and not broken down in the accounts. A coal mine could not be so treated; that is, as a unit in the accounts for the reason that a coal mine is made up of the elements that must be treated under the accounting rules in the various accounts. Your dwellings must be put in one account. The operation of the stores would not be considered a transportation operation. You have tracks and locomotives that would necessarily be broken down. I do not wish to say by this that it is not possible in a scheme of accounts to put the entire investment in one account. The Commission has wide descretion in those matters. But, in my opinion, it would not be good accounting to treat a coal mining property in one account as is done in the case of the electric power plant. Supposing the same thing applies to those other units of property mentioned heretofore; the gas producing plant. In my opinion, there is a decided difference between them and a very radical difference.

[fol. 275] As I have said, I think the Commission could put it (a coal mine) in one account, but, in my opinion, it would be very poor accounting and I question if it would be justified. There is no precedent that I know of by which that could be done.

The coal mining operation is an old business and not a new business. If it was a matter of new business, the accounting could have no precedent, but coal mining is a well established business; the accounting is well established, and the attempt to include the investment in a coal mine in one investment account would be entirely out of line with the principles underlying accounts generally.

I think that this thing of a railroad owning its own coal mines to produce its own fuel for its transportation service is an old thing. The Delaware, Lackawanna and Western Railroad and the D. & H. have done that in the past. The Southern Pacific produced and used oil from its own wells. Beyond that, I have not gone into the history of the accounting. There are two companies, at least, which have produced coal from their own mines up to recently, in the last few years, probably fifty to sixty years. Those mines were not held by the carrier solely for getting coal for transportation service. They were mines held to sell coal for commercial purposes. They did produce and sell coal for commercial purposes.

So far as the effect on the accounts of including the operation of any coal mines in the transportation accounts, I think there is very little difference in that from the situation existing in this case. Those coal properties were held by the railroad itself, owned by the railroad; the Delaware and Hudson Canal Company. One corporation owned the railroad and the mine. There was no subsidiary corporation involved. Those mines were to an extent used for the same purposes as the Norfolk & Western. I cannot say whether in those cases they were held to be in violation of the Sherman Anti-Trust Act and the carrier [fol. 276] not permitted to hold them. I know this: that I think the Delaware and Hudson disposed of its mines about 10 or 12 years ago. I do not think it was compelled to do so. They sold the coal at the mouth of the mines. They did not transport their own coal for sale. I do not know of any carrier that is similarly situated to the Norfolk & Western as regards coal mines. I do not — of any company other than the Norfolk & Western that has the same question as to the classification of coal mines.

I stated that, in my opinion, if a shop is used solely in the construction of new equipment it should be classed as non-transportation property. If the equipment a carrier constructs in such a shop is used in its transportation service, the shop should not be classed as transportation property for the reason that under the conditions stated in the accounting for the operation of that shop can be maintained entirely distinct. For the purposes of the accounts that are kept by carriers, it would be, for the Commission's

purposes, at least, the accounts would be more useful with such a shop classed as non-transportation.

The classification of investment in road and equipment account 20 shops and engine houses, provides for the construction and use of such a shop. And there is no such shop as the one named in existence—one that is used exclusively for manufacturing equipment, so far as I know. If there were such a shop, it should be classified as non-transportation property. In my testimony in chief, I illustrated with a shop, like which there is none in existence, for comparative purposes. There is no shop of that kind, so far as steam railroads are concerned. The Pullman people had such a shop at one time. That was the reason I indicated the principle. It was to indicate the principle that it was referred to.

The Norfolk & Western is a steam railroad. I do not [fol. 277] know whether it is permissive for a carrier to operate a shop except for its own use in transportation. I think that is a legal question. I think the charters of some railroads in some states will permit it. Most of the shops in the country are operated for the benefit of the carrier itself and for other carriers and in the case of the Norfolk & Western it is operated for the benefit of the coal mines to an extent. I assume such shops are so operated for the benefit of the coal mines to the extent that they make mining cars, etc.

I understand the classification must be consistent with the requirements of Section 15-a of the Interstate Commerce Act. Operating expenses affect operating income.

If the physical property, the cost of which is included in the rate base, is the property the operation of which contributes to the railway operating income, the collieries operated by a carrier to supply fuel coal at actual cost, which is included in railway operating expenses, should be included in the rate base. But, under the effective accounting rules, the operations are not includable in the operating expenses of the carrier, and, therefore, the property should be excluded from the rate base.

The cost of fuel burned in the engines is included in the operating expenses, but not the operations themselves. I did not just state that if the cost of the fuel was included in the operating expenses, the operations themselves should be included in the rate base. There is a charge made for the

fuel that is used. The operation of the mine and the cost of the fuel are two different things. The cost of the fuel is includable and is being included in the accounts of the Norfolk & Western Railroad.

I do not think that if the costs of the fuel is included in the operating expenses that the property from which the fuel comes should be included in the rate base. The cost of [fol. 278] the fuel purchased is charged in operating expenses.

The difference in principle whether fuel is purchased in the open market or is taken from the carrier's own mines is this: if you purchase the fuel in the open market, or get it in your own mine, under the accounting rules, the operations of neither mine or of the physical property of either mine is not included in operating expenses.

The following testimony is set out in the exact words of the witness, as otherwise its exact meaning might not appear.

Q. Do you know what is included in the cost of fuel that is charged to operating expenses?

A. There is included the purchase price of the fuel and the cost of handling.

Q. Suppose we produce it at our own mines, what is included in the cost of that fuel that is charged to operating expenses?

A. There should be included in the cost of production and the carrying charge upon the cost of the property the same as has been done by all carriers operating mines, provided that there is an economic operation.

Q. What is actually done now? Do you know what we do?

A. I think so. You are charging the cost of the fuel directly.

Q. Isn't that the same thing as the expense or cost of the operation of the mines?

A. The accounting for the two is entirely distinct.

Q. You are not answering my question. I am asking you [fol. 279] to answer that question. Isn't that expense and that item that is charged to expense, to-wit, the cost of the fuel, isn't that the same item as the cost of the operation of the mines?

A. In amount the same, if the accounting is correct, with this exception, that the cost of operating the mines includes

the cost to the railroad company, includes more than the out-of-pocket cost. It includes a fair carrying charge. This is an out-of-pocket cost you are charging to your expense, as I understand it.

Q. Where did you get that idea? From these exhibits which have been introduced here, is it a fact that the cost of operation of the mines is exactly what is charged as the cost of the fuel and no carrying expenditures are included.

A. That is what I designate as an out-of-pocket cost. Your carrying costs would be beyond your out-of-pocket costs. [fol. 280] *Your carrying costs would be beyond your out-of-pocket costs.*

Q. Are we charging any carrying cost?

A. No, as far as I know.

Q. Isn't it true that the cost of the fuel which is charged to operating expenses is exactly the same item and the same figure as the cost of operating the mines?

A. The amount is the same. The figures are entirely different.

Q. If it costs $10,000,000.00 say, what figure would you write down to show that cost if you do not write down $10,000,000.00?

A. To make my distinction clear, there is a whole lot of difference between a scheme of keeping accounts according to a reasonable scheme and keeping accounts by a cash book. The charge to the operating expenses of the railroad is anal-gous to a charge from a cash book; so much a ton for what is used. If the coal mines were included in operating expenses that, under any reasonable scheme of accounting or the scheme anal-gous to the Commission's accounting, that figure would be lost. You would not find it. You have the maintenance of the property, putting it in the one account you are speaking of. You would have maintenance of the property. You would have your depreciation and practically everything in one account. That account would not be the amount that is chargeable for fuel used each month.

Q. You are talking about something else that has not yet happened.

A. I am talking about what you spoke about doing.

Q. I was talking about something else. I was asking about the classification. I am asking you facts that are currently taking place with the Norfolk & Western. As I

believe you have stated, the cost that we charge to operating expenses for fuel is the same thing as the cost for operating our mines.

A. Is equal to the cost of operating.

Q. Is equal to the cost of operating the mines. Don't we [fol. 281] have this stituation, then, here are coal mining properties and the cost of operating them is charged to the operating expenses of the carrier but the properties are not included as carrier property?

A. The result of the operation of those properties is included in your cost of fuel account, but your operation of those mines is kept in an entirely different set of books entirely distinct from your transportation operations, and that is in accordance with the rules of the Commission which were issued in 1914, and it was understood by your company that was the intent of the rule because that has been the plan of accounting and all other companies that have had mines since that classification was written have accounted for them in the same manner.

Q. I know. I am not talking about the bookkeeping or the methods of doing it or the intermediary steps. I am asking you about a result and, as you, of course know, we are here in a case in which it is being considered whether or not the classification should be changed. It is an open question. Otherwise this hearing would not be going on I have asked you if it is not a fact that the cost of operating these mines is charged to operating expenses of the carrier and the mines themselves are not included as carrier property, or, as you call it, transportation property.

A. The cost of the coal produced is included in the operating expenses, but the operations of the mines are not included in the net railway operating income.

Q. What is the difference in the cost produced and the cost of operating the mines as we handle it?

A. Over a period of years the amount would be practically the same.

Q. Don't we have that situation now existing on the Norfolk & Western under the present facts, month after month?

A. The cost of the fuel charged to operating expenses [fol. 282] is over a period practically the same as your figures of cost of producing as shown in your mine accounts.

Q. Isn't it exactly the same and not practically the same?

A. No it is not exactly the same. It is not the same month by month, and the operations of your mines include a considerable amount of charges that do not come up directly in connection with the operation of the mines. You have depletion charges, which are not operation. They represent the consumption of the capital. Those, of course, enter into the cost of your fuel. There is no more reason why the cost of your fuel produced in your mines through mine operations should enter into the accounts for transportation operation as cost of fuel than it would be for you to include the—

Mr. Funkhouser: Just a moment. I object to the answer because I am asking him as to facts and not as to some philosophical theory of his.

Examiner Walton: Objection overruled.

Mr. Funkhouser: Exception. I just asked him to state the facts as to what occurred on the Norfolk & Western.

Examiner Walton: It may not be so simple to answer.

The Witness (continuing):—for you to consider that the amounts charged for fuel purchased cover the cost of operation of outside mines.

By Mr. Funkhouser:

Q. You have examined our account here. You have been down to Roanoke, haven't you, getting information for this case?

A. Yes.

Q. Don't you know, as a matter of fact, that what we [fol. 283] charge as the cost of the fuel produced in these mines to operating expenses of the carrier is exactly what it cost to operate the mines, nothing more and nothing less?

A. I do not know that. I qualify that answer to say, in my opinion, the accounting is correct, but even if correct accounting the amounts that go into the cost of fuel are not necessarily the cost of operating your mines.

Q. Not necessarily, but in our case and the way we do it isn't it the same?

A. No, I don't think so.

Q. Point out the difference.

Q. You are charging in the cost of the fuel—you are charging cost of depletion and your cost of producing the fuel

into the cost of the fuel itself. You have the same operations in connection with the operation of your mine. Taking the mines, as a whole, you have a profit of $75,000.00 or $100,000,00 a year from the operations in the sale of merchandise. That is an item that does not go into the cost of your fuel.

Q. Don't we give the public credit for that?

A. But it does not go into the item of cost of fuel.

Q. You mean to say we do not take that into consideration when we charge the carrier for the coal that is used?

A. Not in the cost of the fuel that is set up as a separate item.

Q. I mean, doesn't the profit of the operation of the stores go to reduce the cost of the coal to the carrier and the public thereby get the benefit of it?

A. I would say "yes," in general. To the best of my knowledge, yes.

Q. Then I cannot understand why the cost of the fuel to the carrier which is charged to operating expenses is [fol. 284] not exactly the same as the cost of operating the mines.

A. The amounts are equal. There is no question about that.

The witness further testified as follows:

I stated that it would be bad accounting to carry the investment in mining property in one unit if it was classified as transportation property for the following reasons:

Such a classification would not be in accord with the plan of classification of transportation property. A good part of the mine property is not transportation property. The inclusion of the investment in mines in the investment in road and equipment account and in the rate base would involve the inclusion of the cost of millions of tons of coal which will not be used for many years in the future, and which, by no logical reason, can be considered as transportation property. Mining operations are a major industry. The classes of property required are numerous. Tracks are required, locomotives, cars, dwellings and all of these are items of property which, as transportation property, would be separately classified under the plan of the Commission's accounting rules. The mining of coal is a major

industry, or a distinct industry. The production of electric power, gas, or supplying water used for the purposes of transportation are not distinct industries with respect to the production and use for transportation purposes by steam railroads. The mining of coal is a distinct industry and the production of electric power, gas, or water is not. The distinction between the two classifications is that the production of power is a necessary incident of transportation. The power is used for transportation purposes. Without the production of power, there can be no trans- [fol. 285] portation. Coal is used to produce power. In principle the productions of power to propel locomotives by electricity and power to propel locomotives caused by coal are quite anal-gous. Electric power is classified as transportation property and in reason and in principle coal which produces power anal*a*gous to electricity should, as used by the carrier, be considered transportation property.

An electric power plant can be put into one unit in the accounts but the coal power plant or the coal mining property cannot be put into one unit. So far as the commission's classifications are concerned, it is an impracticable matter to do so. Speaking of the coal mining operations, of the Norfolk & Western Railroad, the operations as I stated before, are distinguished. It is a major operation being performed by the railroad company practically as an experimental operation, I assume. It is an operation, the like of which I know of nowhere else. The classification of that operation as the operation of miscellaneous physical property for practical reasons is correct. By so classifying the property the Commission has a distinct record, or there is a distinct record of those operations maintained in the accounts of the carrier. If those accounts be merged in the accounts of transportation the comparison would be destroyed between the railroads. The use of the accounts for that railway for statistical purposes would be impaired. The coal mining operations of that railroad should be for practical purposes of the Commission and of the public classified separately entirely from the transporation operations. There is a serious question as to the outcome of the experiment. The Norfolk & Western in the year 1927 mined a large part of the coal used by it. A road located in the same territory purchased all of its coal. The returns to

the Commission show that the cost of coal for locomotives [fol. 286] for the Norfolk & Western Railway Company averaged $1.74 and a fraction per ton, of the Chesapeake & Ohio, which purchased all of its coal, the cost was but $1.70.

In the accounts of the Norfolk & Western there is nothing included for carrying charges. If carrying charges were included it is doubtful as to how much they should be. The cost would be much higher. The figures which were given by the petitioner as to the cost of handling coal is the gross cost less the earnings from the stores, from rents, from unclaimed wages. The prices charged to the accounts of the carrier were the gross costs and these items of income were credited below the line, below net railway operating income, in an amount of approximately $85,000.00.

A comparison of the gross costs with the cost of coal purchased, as shown in the exhibits, varies about one cent per ton.

These are all facts essential to be known, and it is essential that the accounts should be kept so that they are readily determinable. To include the property as transportation property, the unmined coal, would be an unjustifiable item to include in the rate base.

Those are the principal reasons why it could not be done.

I have described in my direct testimony the method of treatment of rented properties. I did not intend to *cal*ssify the collieries of the carrier as rented property. The purpose of my testimony with respect to rented property was to indicate what, in my judgment, was the proper classification of property as between carrier and non-carrier for illustrative purposes. I think my illustrations were apropos or illustrative of the question involved in this case, so far as rent of the properties—dwellings. I am speaking of the property owned and rented. If you were speaking of the property that was rented and not owned, my recollection is that the carrier has some rented property. I do not [fol. 287] mean that the Norfolk & Western rents from some one else but that it rents some of the lands at one of the collieries. My testimony was of a general character for the purpose of indicating the proper classification of rented property. My recollection is that the Norfolk & Western pays a small rental each year for some surface land at one of the collieries. The record probably shows there is one

small tract of land in this whole case that is rented. My testimony in regard to rented property is directed to that small tract of land to the extent that that property comes within our general description of rented property. Rented property is never set up in the accounts of the lessee. I have stated that one of the reasons why the classification of these coal mining properties should not be changed was precedent. I have never made a research of the situation and am unable to say what the relations were between the coal industries, and the carriers at the time the first accounting rules became effective. The rules specifically providing for the classification of coal mines as miscellaneous physical property became effective about 1908 or 1909. The rules were made by the Commission. I did not write them and did not have a part in promulgating them. I stated before that I had written the rules of the effective classification, but not the classification to which you refer. I did make the effective classification with regard to coal mining property. I was able to make those rules because at that time generally I did know the relations existing between the coal industries and the carriers. I do not recall what those relations were when the first classifications in 1908 or 1909 became effective. Substantially the same classification has continued from that time until the present time. As to whether those rules were based upon the existing conditions and relations at that time between the coal mining industries and the carriers, they were based upon the proper accountings of such operations under the require-
[fol. 288] ments and needs of the Commission, and the manner of classifying the coal mines in the effective classification met with the approval of the accounting offices generally of this country, among others, the Chief Accounting Officer of the Norfolk & Western. In other words, the classification in tentative form was considered by the association of Railway Accounting Officers and no objection or dissent by the association or by the committees of that association were made to such classification. It was my recollection that such rules had the express approval of the Chief Accounting Officer of the Norfolk & Western. I can verify that fact, if desired. The Chief Accounting Officer of the Norfolk & Western was a member of the Accounting Officers Association and they were acting as ex-

perts in advising the Commission in regard to preparation of accounting rules. I know of my own knowledge that it was submitted to the Chief Accounting Officer of the Norfolk & Western. His name, if I remember correctly, was Cox. I cannot tell the date without a reference. Copies of the classification were sent to the Chief Accounting Officers of all railroads. I saw that the Commission sent them. I don't know now, of my recollection, if one was sent to Mr. Cox. I am not guessing as to whether or not he approved of it. Mr. Cox was present as a member of the General Accounting Officers Committee during the period in which these classifications were prepared. That was fourteen years ago. I did not have anything to do with the classifications of 1909. I did have something to do with the effective classification of 1914. At that time, so far as I know, no carriers owned mining property which they used to produce coal for their own purposes and not for commercial purposes.

Those effective classifications were intended to apply to all operations of coal mines. The rules were drawn as nearly as possible to cover changes in the carriers' operations. I think those rules and classifications were intended to cover a situation such as exists in this case and they [fol. 289] probably cover it. I have no knowledge to the contrary that it was the intent of the people who promulgated them at that time.

I take the position that these rules made in 1909—about 20 years ago have a bearing upon the question as to whether or not they should be changed if they are not suitable at this time in that the fact that they have been in use so long indicates the fairness of the rules. With regard to change of the rules, if there was good and sufficient cause and reason for changing them, there is no reason, so far as I know, why the Commission should not change them.

Whether or not sections 15-A and 19-A of the Interstate Commerce Act would have any influence as to whether they should be changed is a question for a lawyer to decide. From the knowledge which I have of the opinions of lawyers, I am of the opinion that under the authority of Sec. 20 of the Act, the rules can be changed at any time by the Commission for good and sufficient reasons. I am of the opinion that the recapture Act makes it more important

that the collieries of the Norfolk & Western should be classified as miscellaneous physical property than would be the case were it not for that section of the Act. For the reason that under that section of the Act the property which is used in transportation service, held for or used in transportation service, is designated to be used as a rate base.

The coal in the collieries of the Norfolk & Western, millions of tons which will not be used for many years to come, is not property used in transportation service. The public of today should not pay a rate based upon and including such property.

Assuming that my answer is correct as to the facts, I think [fol. 290] that reason applies as to the property that is being used now, as the carrier's witness testified that the property was not separable. That witness testified as a fact that the whole property at each colliery was in active development and use. That does not render any of that property transportation property. Coal which is in the ground and which will not be used for 20 or 30 years, is not transportation property in service today which should be used as a rate base. None of the colliery property is used in transportation service. The testimony of the carrier's witness indicates that some of the colliery property is now being used to mine coal which becomes fuel for the transportation service. I never saw any of the coal mined. I have never seen any of this coal which will not be used for 30 years. I am taking the testimony of your witness.

I have assumed, and did assume, that some of the property is being actively used at this time and coal is being produced.

I would classify as nontransportation property that property which is being used at this time to produce coal which is being burned currently.

The following testimony is set out in the exact words of the witness, as otherwise its exact import might not appear.

By Mr. Funkhouser:

Q. But you would not assign the reason that you did a few moments ago, would you, Mr. Barnes, that it is to be used in the future? That is the point I am making.

A. My understanding is that you are talking of two different classes of property.

Q. Didn't you just say that it all went as a unit one way or the other; and your counsel so stated, that it could not be separated and that it was either transportation or non-transportation at each colliery?

[fol. 291] A. Your witness testified that it was not separable. Your question to me was as to the property actually used.

Q. Yes.

A. The coal that will be mined 20 or 30 years from now is not being used or operated.

Q. Is that the reason you would classify that that is being used now as nontransportation property?

A. I would classify all of it as nontransportation property.

Q. And the reason you give, as I understand it, is that there is a lot of coal there that will not be used for 20 or 30 years hence?

A. That was not the reason.

Q. What is the reason?

A. For the reason that the property is not transportation property, neither is the operation transportation service.

Q. I believe from what you said you would classify these mining properties as nontransportation property, regardless of the fact of whether they are being used at the present time or whether they will be used in the future, wouldn't you?

A. I would.

Q. And from that answer, Mr. Barnes, I take it that the question of use is not determinative of your conclusion, is it?

A. That alone is not determinative.

The witness further testified as follows:

Electric power, gas and water supply properties used for the purpose of transportation and owned by the carrier are classified as transportation under the existing account-[fol. 292] ing rules and included in the rate base. Oil wells used in the service of transpor-ation are classified as non-transportaion property. Water wells, if the water be used for transportation service, are classified as transportation property. Water reservoirs when owned by the carrier

and used for transportation purposes are classified as transportation property. If the oil wells produce oil which is burned in the engines and owned by the carrier they are classified as non-transportation property. The distinction that causes that difference in the classification of a water well when the product is used in transportation and the oil well when the product is used in transportation is that the production of oil is a distinct industry. The production of water is not a distinct industry, when conducted by the carrier. The water supply for carriers or water stations are located upon the right of way. The water-stations are of varying kinds, some within buildings, some at stations, while there are other water stations that are located off of the right of way. As a practical matter in accounting they are all included as transportation property. To do otherwise, would result in an undue refinement in accounting for relatively small matters. The classification follows a precedent of many years in accounting when the classifications were issued, and I know of no reason in the recent classifications why there should be a change in classification of such property.

The production of oil is a distinct industry. It is an industry that is distinct from transportation service, and for that reason the investment in and operations of oil wells should be treated as non-transportation service or operations. The water supply is a constant requirement in all transportation operations. I intended to explain that because of the varying conditions and varying situations [fol. 293] with regard to the circumstances surrounding water supplies it would result in an undue refinement in accounting to attempt to separate them as between those that were entirely upon the right of way and those that were not.

A water reservoir off of the right of way which is used for transportation service is, under the Commission's Accounting Rule, and under long established practice, transportation property. Where it is located does not have anything to do with whether it is transportation property if it is used in the service of transportation.

I did not limit the term "distinct industry" to the operation carried on solely in connection with transportation service. It applies to the production of oil generally.

It is not a transportation service in any sense. The burning of oil in the engines is a transportation service. The production of oil is not.

In the production of water, that which goes with the engine, is under the accounting rules, transportation service. The production of oil that goes into the engine is not a transportation service for the reason that the production of oil is one of the major industries in this country and a distinct industry from transportation. The incidental use of water is an entirely different matter.

As to whether or not there is any Accounting Rule or classification that is determinative of whether property is transportation or non-transportation property because it is a distinct major industry, the classifications provide a classification for all property that is used in transportation service and certain properties that are used in non-transportation service. The reasons for the rules are not contained in the classification. The reasoning by which the Commission determined this classification is not contained in the classification itself. The classifications direct the classification of property. They do not give as a reason [fol. 294] for such classification that the property or the operation belongs to a major industry.

The following testimony is in the exact words of the witness, as otherwise its exact meaning might not appear:

By Mr. Funkhouser:

Q. Then what is your authority for stating that this is the reason why some property is not classified as transportation property?

A. My authority for that is my knowledge of the accounts and their development. I am not giving this as the Commission's reason: I am giving the reasons for the preparation of the classifications that were issued.

Q. And that reason would prevail, would it not, although the property is used and useful in the transportation service of the carrier?

A. If used in transportation by the carrier it would be transportation property.

To include the carrier's investment in collieries in road and equipment account would destroy comparisons through

these accounts between roads owning coal mines and other roads. The inclusion of this property in the accounts for transportation property would involve the inclusion of the cost of maintaining the property in the maintenance accounts of the carrier. To the extent that the cost of the operations of mines were included in maintenance, the charge to the fuel accounts would be reduced. The inclusion of this operation in the accounts for transportation purposes would to an extent vary the items of revenues and expenses of operation.

In statistical studies of the cost of maintaining properties there would be a lack of comparability between the [fol. 295] accounts in which were included the collieries and the accounts that did not include collieries.

Many, but not all railroads have gas producing plants. The comparability of the accounts between a road owning a gas producing plant and one not owning a gas producing plant are not destroyed to any extent. The magnitudes of the operations have a great deal to do with destroying the comparability of the account between a railroad owning a coal mine and another that does not.

[fol. 296] The question of how large the operation is, has a bearing. The comparability of accounts would require that the different elements entering into the collieries should be shown in separate primary accounts. The gas producing plants are not of the magnitude and do not include the different activities involved in coal mining.

I do not know of roads of any size that do not have electric power plants. They are a common facility and are generally used. The power plant of the Norfolk & Western is of much greater magnitude than most of the power plants owned by other railroads, because roads quite largely are buying power instead. Comparisons can be made, and comparisons are made as between railroads. Such comparisons are of real value. By such comparisons your company has determined the economy in the use of power plants.

I have testified that "If the carrier's charter permits it to engage in producing fuel for its transportation service and it elects to engage in mining operations, the return on its investment in mining property and facilities should be through the prices credited to its mining operations and charged to its railway operating as the cost of the fuel de-

livered for use in transportation service. The price charged for the fuel should be limited to the normal current commercial prices for similar grades of fuel." I do not think such a plan would destroy the fundamental principles of sound accounting of steam roads and open the way for carriers to enter other operations for the purpose of supplying equipment and materials at commercial prices when the return on its investment would be greater than allowed in the rate base. The current commercial prices for similar grades of fuel would be determined by quotations for contract coal. The commercial contract prices are fairly well established for coal. By contract coal, I mean contract coal purchased [fol. 297] by railroads. I do not know what percentage of coal is contract coal. It is not my understanding so far as railroads are concerned that a small percentage of the coal sold in open market is contract coal. Contract prices for coal to railroads are commercial prices.

Generally the market price of coal is different from the so-called contract prices. At other times it is not. I think it would be a fair basis to determine the prices for similar grades of coal by taking the price at which the railroad buys coal at contract prices.

If a railroad produced all of its coal and did not buy any, the price would be determined by the contract price of coal paid by some other railroad, if it was evidenced that they were fairly representative of the current contract prices. Prices are fairly well determinable by any railroad whether it is buying or not.

The commercial prices of coal delivered direct from any mines to the coaling station would be determined in the first instance by the purchasing agent or the fuel agent of the railway. The commission would ordinarily check the reasonableness of the rate, if the question arose.

[fol. 298] The following testimony is set out in the exact words of the witness, as otherwise the exact meaning might not appear:

Q. Are carriers permitted to produce equipment or other units of property and charge into its account as the investment current market prices?

A. If the facilities used in producing the equipment are transportation facilities and the return to the carrier is

through the rate base. In that respect it is different than the production of coal.

Q. But you have not answered my question, Mr. Barnes.

A. They are required to charge the equipment to the investment account at cost to the carrier.

Q. Isn't the answer to my question no, they are not permitted to do so?

A. If that answer is preferable, I will be glad to give it.

Q. Well, isn't it true? Isn't it correct?

A. Surely, I would not give it if it were not.

[fol. 299] Q. Now, I am to ask you to please explain wherein this would differ in principle from the plan you suggest for handling the mining of coal.

A. The principle with regard to charging the commercial rates is the same wherever it be followed.

Q. Then under the present classification rules of the Commission it is not permitted, is it?

A. That principle is not permitted.

Q. But you have suggested that it be done. How could it be done under the present classifications of the Commission?

A. I was speaking to the manufacture of equipment, not to the coal.

Q. But you have just said that the principle is the same, so how could it be done for coal under the present classifications or any classifications if it is wrong as to the manufacture of equipment?

A. It is contrary to the rules with regard to the manufacture of equipment. It is wrong according to the rules. If the rules were different it might be right.

Q. Would not the same thing apply to the classification of our coal mining properties? It is wrong under the present classification, as you say, to call it transportation property, but if the rules were changed it would be right?

A. It would be right according to the rules, whatever the rules may be.

Q. So there is no particular sanctity to any of these rules, is there?

A. The Commission has the power to change all rules. No, let me give you the correct answer.

[fol. 300] The witness further testified as follows:

The plan of charging coal produced at the carrier's mines into the operating accounts of the railroads at current

market prices would necessitate changes and adjustments in railway expenses and income since 1917, if the order were made retro-active; otherwise, it would not. The order would not have to be made retro-active in order to give the railroad proper consideration of return on its investment, because a reasonable adjustment might be effected with respect to past operations by a special rule. In order to put into vogue the general rule, it would not be necessary to enact a special rule to assist or supplement it.

As to the railroad being compensated for its investment since 1917 during which time the railroad has been charging the coal to operating expenses at the actual cost to produce it, I know of no source by which the railroad can receive any additional compensation from 1917. The showing as to net operating income might have been different under such a rule than the accounts as now stated. That would not give the carrier any more revenue.

The following testimony is in the exact words of the witness, as otherwise the exact meaning might not appear:

Q. Then under your plan you would not compensate the railroad for its investment since 1917 up to the present time?

* * * * * * *

By Mr. Funkhouser:

Q. I do not mean you personally, but would the railroad have any return on its investment from that time to the present time? You have proposed a plan which is supposed to give them a return on investment.

A. By reducing the net railway operating income there is nothing in the accounting plan that will increase the [fol. 301] carrier's gross income, its gross earnings. That must come from the public, I assume.

Q. Then that would mean a revision of the accounts since 1917 to what you just said, would it not?

A. I said if the rule were made retroactive it would be different from the present rules.

Q. Then if they are to be compensated in the past it would mean a revision of the accounts, as I have stated, would it not?

A. I don't understand that the change in the accounts in 1917 would give you any different compensation. It is a

closed matter. You received so much compensation, so much earnings. That is fixed.

Q. What compensation have we received for the investment so far?

A. You have received all of the compensation you have received as there applied to the mining property or to other property owned by your company. Now, the accounting has made the assignment of the gross income. The income itself cannot be changed. I know of no source from which you can get for 1917 that which you have not already received.

Q. What is that that we already received? In your opinion, what compensation do you consider that we have received for the investment in these properties upon the basis of their being non-carrier property?

A. All of the compensation that you received is applicable in 1917 to the property which you owned or which you operated.

Q. Well, what was it. That is what I am asking you.

A. All of the property that you operated.

Q. What compensation did we receive? That is what I am asking about.

A. I do not have your annual reports here. I can give it to you if you have your annual reports here. It is stated in your annual reports.

* * * * * * *

[fol. 302] By Mr. Funkhouser:

Q. To make it clear, if there is any misunderstanding in these questions between us, our position is that we have received no compensation on that investment. And if your plan goes into effect and it is treated as non-carrier property, I am asking you now how you would compensate us under your proposed plan for the past?

A. Possibly, I can make it clear to you. When you acquired this property had you included in the cost of the coal charged to operating expenses a fair carrying charge, the same as other carriers did that were operating mines, your returns on your mining operations would have been credited to your miscellaneous operations. The amount that has been charged there to rail line operations as a carrying charge would have reduced the net railway operating in-

come. It is just taking it out of one pocket and putting it into another. Is that clear to you now?

Q. But that was not done. So does it not follow, Mr. Barnes, that your plan would necessitate changes and adjustments in the railway expenses and income since 1917?

* * * * * * *

The Witness:

A. Relating further to the question, during that period of Federal control you were paid a special compensation for the use of those mines. You were the only company that was paid a special compensation.

By Mr. Funkhouser:

Q. Well, that was only for a year or so. It went over on January 1, 1918, and was taken back in 1920, I believe. Omit that and take the rest of the time.

A. So far as your closed accounts are concerned, a change of basis of accounting for the cost of your coal would simply take out of one pocket and put into another in the accounts. It would take out of net railway operating income and put into miscellaneous operations. Your total would be the same.

[fol. 303] Q. But that would mean just a revision of the accounts, would it not?

A. That is all.

* * * * * * *

The witness further testified as follows:

The Director General during the period of Federal Control took over and operated the carrier's collieries constructively and possibly actively. He had the right to do it. He paid extra compensation for it. If he did not operate them he paid the carrier because he agreed so to do in the contract. The Director General did operate the mines during such period. I did not testify that I made the settlement with the Norfolk & Western. I did say that after Federal Control, it became my duty to check with the representative of the railroad company this carrier's claim under this contract with a claim of the Director General reconciling differences. In this work the representatives of the

railroad and myself reached an agreement with regard to debits and credits, amounting in gross, to $159,728,834.23. There remains six items of difference in favor of the carrier in the net sum of $811,503.27. To the best of my recollection, the agreement made with the Norfolk & Western covered the amount due for the operations of its coal mines. I did not make the settlement or the agreement for the settlement. I made a check to determine how many items were in accord.

I have not the least idea as to how the cost per ton of coal mined at the carrier's collieries during the period of Federal Control compared with the then current market prices of similar coal. I never checked it or attempted to check it. I haven't the least idea what the saving effected in favor of the Director General through the operation of the mining properties of the Norfolk & Western was. Nor do I know whether he effected a saving.

In stating that the taking over of these collieries was by mutual agreement and for the benefit of the Director Gen- [fol. 304] eral's transportation operations, the benefits referred to were the securing of a supply of coal for carrying out his operations, the same benefits as though he contracted with any other mining company to furnish coal. The term is used in the same sense that we would say that he made a contract with a coal mining company for the benefit of its operations. The benefits that he did reap were that he secured the coal to carry on his operations. I do not know that he secured the benefit of getting coal at greatly reduced prices as compared with the market prices. I never checked it up. I do not know that the Director General did reap benefits. He used the mines for the benefit of his operations, but financially, I do not know wherher he received any benefit from it or not. Assuming that he did reap a benefit, the users of transportation would not be just as much entitled to it today as the Director General was. I know that the Director General used the mines to produce coal which was consumed in his transportation operations.

I was formerly in the employ of the Director General for about four or five years as Assistant Comptroller.

I know that the Director General paid an agreed price for the use of the mines. I do not know whether there was a saving of money. He got the mines or the use of the mines at a basis that was satisfactory to the Norfolk &

Western Railway Company and to the Director General. As to whether he saved money, in order to save you must have a basis to compare with. You have given me no basis with which to compare. The Director General has the benefit of all outstanding contracts. On contract coal with railroads the current market prices during that period were not up to as much as 16, 18 or 20 dollars a ton. I think the Director General could purchase coal that he needed as contract coal. He had the power to get it.

The taking over of these collieries by the Director General did not change their classification, nor did it bring the [fol. 305] operation under the jurisdiction of the Interstate Commerce Commission. They did not become transportation facilities for the reason that the Director General's power was not limited to transportation properties subject to the jurisdiction of the Commission. He not only took over properties not transportation properties but he took over constructively railroads in Canada. Railroads in Canada were transportation property, but they were not transportation property subject to the jurisdiction of the commission. They were not Interstate Commerce. The Director General had authority to take over coal mines which were not considered as transportation facilities, if it was to his advantage to do so. He had a right to secure his fuel supply. He could contract with a mine to obtain it or to purchase it.

ARTHUR S. FIELDS, recalled, testified as follows:

I am familiar with carrier's exhibits 5, 50, 51 and 52, and upon the basis of the amount of the investment reported by the carrier in these exhibits for different periods and the amount of costs for the production of coal, exclusive of an interest carrying charge, I have prepared an exhibibt showing the carrying charge upon the basis of 6%. This document was offered and admitted in evidence, marked "Commission's Exhibit #74."

(Here follows Exhibit 74, side folio 306.)

NORFOLK & WESTERN RAILWAY COMPANY

Commission's

SAVINGS REALIZED ON COAL MINED BY CARRIER: EXHIBIT NO. 5 BY CARRIER ADJUSTED TO INCLUDE IN COST OF COAL MINED INTEREST AT 6 PER CENT ON INVESTMENT

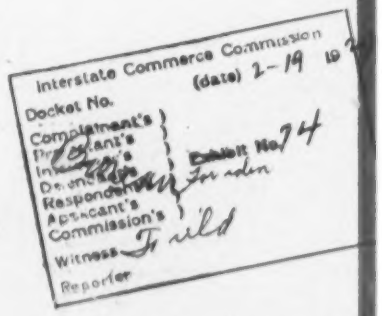
Year. (1)	Net capital investment on December 31st of each year, (1926, Sept. 30), obtained by adding column footings from carrier's exhibits: 50, 51 and 52 (2)	Interest one year, at 6 per cent on the net capital investment shown in Col. (2) (8-1/3 Mo. 1917; 9 Mo. 1926) (3)	Tonnage mined, as per Column 2, carrier's exhibit 5 (4)	Interest per ton mined. Col.(3) ÷ Col.(4) (5)	Net cost per ton (excluding interest) as per Col. (3) carrier's exhibit 5 (6)	Total burden per ton on railway patrons. Col.(5) + Col.(6) (7)	Average cost per ton of purchased coal, as per column (4) carrier's exhibit 5 (8)	Saving (+) on coal compared herein Per Ton. Col. (8) - Col. (7) (9)
December 31,								
1917	$ 1,977,375.13	$ 82,390.30	254,578.95	$ 0.3236	$ 1.1555	$ 1.4791	$ 2.4778	$ + 0.9987
1918	2,122,311.08	127,338.67	382,639.41	.3328	1.6991	2.0319	2.5655	+ .5336
1919	2,157,985.47	129,479.13	455,936.32	.2840	1.8927	2.1767	2.6018	+ .4251
1920	2,108,715.20	126,522.91	211,731.70	.5976	3.5545	4.1521	4.2338	+ .0817
1921	2,743,706.66	164,622.40	547,791.42	.3005	3.0951	3.3956	3.5144	+ .1188
1922	2,779,841.73	166,790.50	672,117.49	.2482	2.0281	2.2763	2.3985	+ .1242
1923	2,886,100.04	173,166.00	874,723.80	.1980	2.2487	2.4467	2.8571	+ .4104
1924	2,774,449.39	166,466.96	932,266.76	.1786	1.9476	2.1262	2.1649	+ .0387
1925	2,924,105.83	175,446.35	927,514.28	.1892	1.6572	1.8464	1.7151	- .1313
1926	2,852,270.78	171,136.25	1,045,087.24	.1637	1.7446	1.9083	1.7634	- .1449
1927	2,780,101.43	166,806.09	1,108,969.96	.1504	1.6198	1.7702	1.7032	- .0670
September 30, 1926	2,650,467.28	119,271.03	1,062,700.05	.1122	1.5481	1.6603	1.6566	- .0037
Totals	-	1,769,436.59	8,476,057.36	-	-	-	-	-
Averages	(a) 2,576,859.40	(b) 154,611.56	-	.2088	(c) 1.9115	(c) 2.1203	-	(d)+ .1017

(a) Weighted average investment, amount each year weighted according to length of period for which interest is computed on it.

(b) Total interest divided by total period, 11.4444 years.

(c) Weighted average, amount each year weighted according to respective tonnage mined.

(d) Total column (10) divided by total column (4).



NORFOLK & WESTERN RAILWAY COMPANY

Commission's Exhibit 14

SAVINGS REALIZED ON COAL MINED BY CARRIER: EXHIBIT NO. 5 BY CARRIER ADJUSTED TO INCLUDE IN COST OF COAL MINED INTEREST AT 6 PER CENT ON INVESTMENT

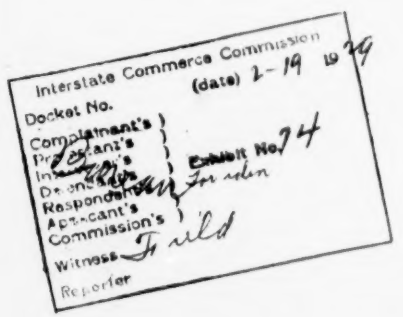
...t capital invest-...t on December 31st ...f each year, (1928, ...t. 30), obtained by ...ing column footings: ...m carrier's exhibits: 50, 51 and 52 (2)	Interest one year, at 6 per cent on the net capital investment shown in Col. (2) (8-1/3 Mo. 1917; 9 Mo. 1928) (3)	Tonnage mined, as per Column 2, carrier's exhibit 5 (4)	Interest per ton mined. Col.(3) ÷ Col.(4) (5)	Net cost per ton (excluding interest): as per Col. (3) carrier's exhibit 5 (6)	Total burden per ton on railway patrons. Col.(5) + Col.(6) (7)	Average cost per ton of purchased coal, as per column (4) carrier's exhibit 5 (8)	Saving (+), or loss (-) on coal mined as compared with coal purchased: Per Ton. Col. (8) - Col. (7) (9)	Amount. Col. (9) x Col. (4) (10)
1,977,375.13	$ 82,390.30	$ 254,578.95	$ 0.3236	$ 1.1555	$ 1.4791	$ 2.4778	$ + 0.9987	$ + 254,248.00
2,122,311.08	127,338.67	382,639.41	.3328	1.6991	2.0319	2.5655	+ .5336	+ 204,176.39
2,157,985.47	129,479.13	455,936.30	.2840	1.8927	2.1767	2.6018	+ .4251	+ 193,818.52
2,108,715.20	126,522.91	211,731.70	.5976	3.5545	4.1521	4.2338	+ .0817	+ 17,298.48
2,743,706.66	164,622.40	547,791.42	.3005	3.0951	3.3956	3.5144	+ .1188	+ 65,077.62
2,779,841.73	166,790.50	672,117.49	.2482	2.0261	2.2743	2.3985	+ .1242	+ 83,476.99
2,886,100.04	173,166.00	874,723.80	.1980	2.2487	2.4467	2.8571	+ .4104	+ 358,986.65
2,774,449.39	166,466.96	932,266.76	.1786	1.9476	2.1262	2.1649	+ .0387	+ 36,078.72
2,924,105.83	175,446.35	927,514.28	.1892	1.6572	1.8464	1.7151	- .1313	- 121,782.62
2,852,270.78	171,136.25	1,045,087.24	.1637	1.7446	1.9083	1.7634	- .1449	- 151,433.14
2,780,101.43	166,806.09	1,108,969.96	.1504	1.6198	1.7702	1.7032	- .0670	- 74,300.98
2,650,467.28	119,271.03	1,062,700.05	.1122	1.5481	1.6603	1.6566	- .0037	- 3,931.99
-	1,769,436.59	8,476,057.36	-	-	-	-	-	+ 861,712.64
(a) 2,576,859.40	(b) 154,611.56	-	.2088	(c) 1.9115	(c) 2.1203	-	(d)+ .1017	

(a) Weighted average investment, amount each year weighted according to length of period for which interest is computed on it.

(b) Total interest divided by total period, 11.4444 years.

(c) Weighted average, amount each year weighted according to respective tonnage mined.

(d) Total column (10) divided by total column (4).



The words and figures in column 1, exhibit 74, represent the period ending on the date indicated in that column, for which interest was computed at 6% upon the amount of the investment shown at the end of each respective period. The date of the end of the period for each year is December 31, with the exception of 1928, which ends with September 30th, for the reason that the information in the [fol. 307] carrier's Exhibits ends September 30th, 1928. The figures noted in column 2 correspond to the dates set out in column 1 and represent the added column footings for carrier's investment as shown by carrier's exhibits 50, 51 and 52. Without going further into detail, the further columns of Exhibit 74 are based upon the different figures set out in carrier's Exhibits 5, 50, 51 and 52 with my addition of 6% interest as carrying charge on the investment for the various periods indicated in column 1. For the period ending December 31, 1917, the computation of interest begins with the date in April, when the properties were acquired and for the year 1928 the computation of interest was for the nine months ending September 30, 1928.

That interest at 6% was then combined with the cost per ton as shown on Carrier's Exhibit No. 5 to bring out what the cost per ton would be if interest at 6% were calculated in the total cost of coal taken out. In column 4, a dollar sign is shown. That is error. The amount shown in that column is tons transcribed from carrier's Exhibit 5.

In general, taking the investment shown at the end of each of the respective periods interest at 6 per cent on that investment for the period ended on that date was computed and is shown in column 3.

In column 4 I have transcribed the tons mined during those respective periods as shown on carrier's Exhibit 5.

In column 5 the interest is reduced to a per ton basis. Column 6 is the net cost per ton as reported on carrier's exhibit 5.

To the amount reported by the carrier and shown in column 6 is added the interest per ton as shown in column 5, giving the total burden per ton on railway patrons shown in column 7.

[fol. 308] By that is meant that the patrons of railway service must compensate through operating expenses for the cost of coal charged into operating expenses and a return on the value of the property used in the production of

that coal included in the value of carrier's property upon the assumption that this is classified as carrier property.

The average amount paid for coal purchased during these respective periods is shown in column 8, which is transcribed from carrier's Exhibit 5.

Then in column 9 is shown the difference between the total burden that the railway patrons would bear for the coal supplied the carrier in that manner and the average cost per ton of coal purchased during the respective periods, bringing out in column 9 the resultant fact whether the burden upon the railway patrons was more or less than the cost per ton of coal purchased.

Where there was a saving in the coal produced from the carrier's mines as compared with that purchased it is shown with a plus sign before it in column 9.

Where the coal derived from the carrier's mines with carrying charges included was more than the average cost per ton of coal purchased the difference is shown with the minus sign before it in column 9.

In column 10 is shown the total of the difference between the cost of all coal taken out of the carrier's mines and what it would have cost if purchased at the price which was actually paid for purchased coal. That is obtained by multiplying the difference per ton, as shown in column 9, by the amount of tons mined, as shown in column 4.

This comparison is exactly the same kind as was made by the carrier in its Exhibit 5, with this single difference, that there is included an element of interest upon the investment [fol. 309] in the coal properties at the rate of 6 per cent per annum.

The last line, called totals and averages, shows for the entire period from April, 1917, to September, 1928, the weighted average difference between the cost of coal taken from the carrier's own mines, including this interest element, and the cost of coal purchased.

The following testimony is set out in the exact words of the witness, as otherwise its exact meaning might not appear:

Q. Mr. Field, if it be assumed from the evidence heretofore given by the carrier that during the year 1921 and the prior years in the life of coal project, conditions were abnormal as to the market prices of coal and the cost of producing coal, and if you consider the cost of coal production according to your Exhibit No. 74 from the end of 1921 down to

September 30, 1928, what would be the results for that period as shown in columns 9 and 10 of Exhibit 74?

A. As the exhibit stands it indicates that for the entire period included in the exhibit the coal taken from the carrier's mines, including the element of interest, cost 10.17 cents less per ton on the average than the coal purchased. The total amount saved on all coal taken from its mines during that period was $861,712.64. If the assumption you are postulating the period to the end of 1921 be eliminated and we deal only with the data for the years 1922 to September 30, 1928, the average saving per ton on the coal mined as compared with the cost of coal purchased would be 1.919 cents per ton and the total saving on all the coal mined during this latter period would be $127,093.63.

[fol. 310] (The following testimony with reference to the figures $84,956.99 at the bottom of column 28, Carrier's Exhibit 53 was objected to on the ground that the exhibit speaks for itself. The objection was overruled and exceptions duly taken.)

I understand (if I understand the Carrier's Exhibits) that the figure $84,946.99 at the bottom of column 28 Carrier's Exhibit 53 is a total which the carrier designates as miscellaneous income from mining property operations for the year ended December 31, 1927. If this figure had not been credited against the cost of producing coal, carrier's exhibit 5 would have shown a greater cost per ton for the coal produced for the reason that the net cost per ton, as [fol. 311] there shown, is based upon the total gross cost, less credits aggregating the said sum. In preparing Exhibit 74, I made no adjustment on account of this item of $84,946.99. If I had made an adjustment, I think I would have added it. In other words, my Exhibit 74 was made upon the basis of the figures shown in carrier's Exhibit No. 5, without any adjustment whatever on account of the figures shown in Exhibit 53.

Cross-examination:

I mean by "without any adjustment being made on Exhibit 53" or "without figures shown on exhibit No. 53" that if it were desired to ascertain the gross cost of mining the coal from the carrier's mines, without any offset for the

items credited to that gross cost and detailed in exhibit No. 53, it would be necessary to increase the net cost per ton, as shown on carrier's Exhibit No. 5 by an amount that would be derived from the $84,000.00 for the year 1927 and a corresponding amount for the other periods. It would be the same for all other periods but I took the year 1927 to identify the $84,000.00 which pertains to that year. It would not necessarily be $84,000.00 for every year. My Exhibit 74 is hypothetical with respect to the factor of interest. It assumes also whatever underlies the data in Exhibit 5 of the carrier. It does not picture any condition now existing on the Norfolk & Western because I understand the coal properties are not included in carrier property and would, therefore, not be in the rate base. I do not know whether it pictures any condition or situation that has ever existed since the mines were owned. If these coal properties have never been included in the road and equipment account as transportation property, then it has pictured no situation [fol. 312] that has ever existed. It is intended to show what would result if these coal properties were classified as carrier and in any valuation proceedings included in the value of the property used for transportation purposes. The reason for handling the properties as suggested in this Exhibit is that I understand the carriers are asking that these properties be classified as carrier and this is a picture of the situation should they be classified as transportation property, assuming the costs produced in Exhibit No. 5. The authority for adding as overhead six per cent interest is this: If these coal properties are carrier property, they must be included at any value of carrier property used in any consideration of rates or net railway operating income, and there would have to be included in the net railway operating income whatever amount would be necessary to give a return on the value of these properties equal to the net railway operating income earned on the rest of the carrier property. If that were six per cent, then it would be six per cent on these properties, or more or less as the case might be.

Assuming that the net railway operating income would amount to as much as six per cent on the entire value of carrier property including these coal properties, I would be adding there the amount the carrier would earn on this

investment before there is recapture. So my idea in this calculation is to have it as any other carrier property, assuming it is handled in the same way.

In fixing the cost of operation of the Flat Top yards in the coal fields and in valuing such yards I would not add six per cent of the carrying charge to the value.

[fol. 313] The following testimony is set out in the exact words of the witness, as otherwise its exact import might not appear.

A. In Exhibit 74 I simply ask this question: Suppose this coal property were classified as carrier property and included in the value of the property used for transportation purposes; then, in any case involving a determination of rates where it would be necessary to inquire whether the rates in question would permit a net railway operating income equal to a reasonable return on the value of your property, or in any case involving the recapture of possible excess earnings, these properties would enter into the value of railway property as a whole with a claim upon the patrons of the railroad who supply the revenues through their payments for services rendered equal to their prorata share of the necessary net railway operating income to give the return on the entire value.

My answer as given is rather involved there. I don't know whether you see what I meant or not.

So in any case involving a determination of rate structure or recapture the patrons of the road would be required to supply enough in revenue to yield a return on these coal properties equal to the return on the rest of the railway property, and therefore, these properties would become a burden here, as I have put it, upon the patrons, just as all other railway property is a burden upon the patrons.

Q. Why would you add a carrying charge to these properties when a carrying charge is not added to the other property necessary as transportation property of the carrier?

A. Well, it would be, Mr. Funkhouser, just as this is done if you were to first slice off as net railway operating income [fol. 314] 6 per cent of the value of the property.

The witness testified further as follows:

In other words, what has been done here, instead of taking the actual figures of value and of operating cost, there has been added to this what the carrier is entitled to under the transportation act before there is any recapture. By your question: "In railroad accounting is that the way you ordinarily determine the cost of service and things of that sort?" you are raising a question that is a good deal controverted among accountants whether the carrying charges are a part of costs. You notice that I used the term "burden on patrons." Whether it is cost of service or what you call it, the patrons do have to pay a reasonable return on the value of property devoted to their service. And if the road is earning enough to be subject to recapture that return is at least six per cent. What is really done (in this Exhibit) is the adding in there as a part of this burden, the profits that the stockholders and bondholders make because of their investment. The net railway operating income includes all of the return on the value of the property and regardless of how it may be distributed to security holders or lessors or what not.

If these mines were included as transportation property and a recapture hearing was had to determine the net railway operating income the carrier would not be allowed as operating expenses, the figures shown here plus the carrying charge. Into the operating expenses would go the figures shown on carrier's Exhibit No. 5. Exhibit No. 74 does not picture what the operating expenses technically would be if the mines were considered transportation property. [fol. 315] If these mining properties were included as transportation property and the railroad operated and did not make any net profit, and were not in recapture and did not even make a reasonable return within the amount they would be allowed to keep, then this Exhibit would not correctly portray what the railroad would get out of it. The 6% used in this Exhibit should, as a general proposition, be whatever percent the net railway operating income might be upon the value of the property used in the transportation service. In other words, it might be 2 per cent, 3 per cent, 4 per cent, or what not.

If the road did not make anything, but lost 10% for a certain year, the public would be getting some service for

which it was not paying. So this Exhibit pictures only a condition when the road is prosperous.

If there is testimony to the effect that the carrier saved some twenty cents a ton by delivering the coal from the mines to coaling stations without loading and unloading cars and that fact is not shown in carrier's Exhibit 5, then it is not shown in Exhibit 74. In other words, Exhibit 74 does not include or refer to any saving not shown in carrier's Exhibit No. 5.

My Exhibit No. 74 shows that by taking carrier's Exhibit No. 5 and introducing therein the element of carrying charges of 6 per cent the saving shown would be $861,712.64 instead of the sum of $2,631,445.65. If there was an additional saving of twenty-four cents per ton because of delivery direct to the tipple, without the intermediate use of coal cars that would be an additional saving.

I am not a mining engineer and have never had any experience at all in that capacity. I have had no practical [fol. 316] experience as an accountant with any corporation, but since 1920, in my present position I have had to deal with the analysis of carrier's accounts as compared by Accountants of the Bureau and interpret them in writing up the accounting reports used by the Commission as one of the underlying reports in its basic valuation. That is the sort of practical experience I have had. I have never acted as an accountant for any coal producing company.

Exhibit 54 is an analysis applicable to the Howard Colliery alone. I have made no analysis of the Vulcan, and Pond Creek properties. Exhibit No. 54 was not, in fact, intended to reflect the experience of even the Howard Colliery as such. It is intended solely to make a comparative showing of the effect of classifying in alternative ways and accounting for in alternative ways an investment in coal properties. I happened to take $900,000.00 because that is the figure given in the record as the cost of the Howard Collieries.

In other words, I have taken an illustration to illustrate what I show there by taking part of the investment at one of the collieries only, for the reason that I understand that the Howard Collieries is the only one where you have the right to take coal without the payment of royalty.

In Exhibit 54, I dealt first in what has been designated as case one with the present order of the commission. In

case on sheets one and two of that Exhibit referring to the order of commission that the carrier's investment in coal properties shall be classified as investment in non-carrier property and included in balance sheet account 705, and that annually there shall be added to the cost of these properties and included in this account interest upon the residual investment reckoned at fair interest rates, I have not so [fol. 317] treated the investment in Howard Collieries. I have treated and assumed investments in coal deposits only, leaving out of account any investment in plant and equipment because the plant and equipment is a renewable investment. It depreciates and is restored and will be more or less constant. It may be increasing as the development enlarges while the investment in the coal deposits is necessarily a diminishing investment and it was that feature I wanted to bring out in this comparison. I followed the present accounting order of the commission with respect to the investment in coal deposits, but not as to the balance of the investment. So that case one, Exhibit 54, does not reflect the order or carry out the present order of the commission as given to the carrier as comprehending all of the investment. I did not consider the heading "Case one classified as non-carrier under order of Division 4 January 14, 1928" as misleading, because I was not attempting in this exhibit to make a comparison of the entire investment in the Howard Collieries or in any of the others but to bring out the comparison of the different effects of different methods of treating this kind of investment in coal deposits. I assumed a certain investment in coal deposits to last an assumed period of time, 40 years, and then attempted to show accounting for the depletion of that investment would enter into the operating expense or into the burden of railway patrons for the coal used, leaving out of account all question as to the return on the investment in plant, operating costs, and so forth, which would be the same regardless of how you accounted for the depletion. It was to illustrate the different effect of different methods of accounting for and investment in a deposit of coal that would be depleted. [fol. 318] The commission's order dealt with the investment in coal and also in equipment but I have dealt in case one with only the investment in coal. I have not attempted in case one to deal with everything covered by the commission.

Within the burden of the part of the investment that I did consider I made this tabulation in accordance with the order of the Commission. And further with respect to the order of the Commission, there has been some difference of opinion among those with whom I have talked as to just how much investment in these coal properties was contemplated by that order. I wanted to avoid that controversy so I left aside all investment except that in coal deposit itself, which obviously was intended to be covered by the order, meaning by that the cost (coal) deposit upon which there are no future royalties to be paid and which will be exhausted in the course of time and which must be covered somehow in the compensation secured for the coal taken out over the period that it lasts. So the final figures on sheet 2 of case one, Exhibit 54, are not intended to and do not reflect the application of the order of the commission as to the whole investment at the Howard Collieries—only the coal deposit.

The order of the Commission does not in words limit the residual investment to coal deposits or anything else particularly. It actually says "the carrier's investment in Howard, Vulcan and Pond Creek Collieries" and I understand that there are no coal deposits owned at these two latter collieries so that if the order means the total investment in coal deposits, plant and equipment then case one of Exhibit 54 is not in conformity with the order.

In case one I have assumed a uniform rate of mining for forty years. If the coal was not mined at the rate assumed it would affect all of Exhibit 54 as to the particulars shown. It would not affect it with respect to the comparative ele- [fol. 319] ments. On sheet two of case one of the said exhibits the figure .093 used to indicate the return on plant and development was arrived at as follows:

On Carrier's Exhibit No. 4 there is given an analysis of its investment in these properties, and for the Howard Collieries there is shown as of September 30, 1928, the investment. I took that amount and allowed for the investment in the coal deposits included in that and derived the portion that would be applicable to the plant and equipment. It was something in excess of $900,000.00. So I adopted for the purposes of this comparison per se $900,000.00 as my assumed investment in plant and equipment

to be considered in connection with my assumed investment of $900,000.00 in coal deposits. The interest on $900,000.00 at five per cent, the rate used in this case 1, is $45,000.00 per year, and at an annual extraction of 465,000 tons, which is the rate I have used in this computation, it gives 9.3 cents per ton.

Now, that is not intended to be the rate of return upon the actual investment in plant and equipment. I wanted to get a figure somewhere near the probably exact investment in plant and equipment that would introduce that factor in this illustrative comparative statement.

Referring to carrier's Exhibit No. 4, there is shown as the net capital investment on September 30, 1928, in the Howard collieries $1,660,394.23. That is written down by the amount of the depletion reserve of $203,177.15. In order to restore that to the initial investment of $900,000.00 in the coal deposits I added $203,177.15, giving $1,863,571.38. Now, that includes, on my procedure here, an investment of $900,000.00 in the coal deposits. Subtracting that left $963,571.38 as the remainder assignable to all other investment. [fol. 320] I adopted $900,000.00 as a round figure because I was not concerned with the exact amount but an amount not too far away from the exact amount.

I took 5 per cent as the interest rate used in this case one, $45,000.00. Then I reduced that to a per ton basis by dividing it by the assumed rate of mining per year 465,000 tons. There was a mistake in the division, the correct figure being .097 instead of .093, making a difference of three or four mills. In taking the 5 per cent I had to assume some rate of interest for figuring the compounded return on the residual investment. The order says any reasonable return not in excess of 6%, and considering that, upon the basis of the order, whatever interest rate is allowed would go into the price of coal charged into the operating expense, and, therefore, would be a guaranteed [fol. 321] return, provided operating expenses were earned. I assumed five per cent would not be too low for the purpose of the illustration in the Exhibit.

By using the fixed charge of 9.3 cents per ton on sheet 2, as indicated the investment in plant and equipment and mine development after being subject to proper depreciation, will remain constant throughout the entire life of the property because there would necessarily be renewals.

There will be depreciations, retirements and renewals. Toward the end of the forty-year period, assuming that the estimate that the coal would be gone substantially by that time is correct, you would naturally not renew that plant in that period, except such parts as could be removed somewhere else, and you would have a declining investment in plant toward the end of the period. It could not remain constant each year, as I have it. As an actual fact investment in plant would probably go up and down from year to year, but I would there have to assume it was practically constant, or assume a variation from year to year, and it was far safer, and no less erroneous to assume a substantial uniformity than to assume some fictitious variation. This is not intended, of course, to predict throughout forty years the actual amounts of these factors. In any one of these methods applied over forty years, there would have to be adjustments from year to year to take account of variations in the factors entering into it. That would not interfere at all with the purpose of this exhibit to show the comparative effect of the different methods provided I used the same assumptions in each method. I bring out the comparative effect of these methods which is the sole purpose of the exhibit. The .093 used in the last column sheet 2 would not remain the same throughout the forty-year period, but it would be reduced. I am not able to tell how much. It would require a man familiar with mining property to determine that. For that matter also [fol. 322] the amount in column 4 and the residual investment would not remain the same from year to year, because, in all probability you would not mine the same amount of coal each year. Then after the coal is gone, the investment in plant and equipment would come down to the point where there was no investment less salvage, except such property which could be removed to some other mine operation.

The market price of coal would have to be considered in determining the proper accounting system because any private concern operating a coal mine, I would presume, would have to follow the same kind of calculation that any other industry would and look ahead over a long period of time. And in the long run he must get back in the price at which he sells his product his cost of producing it plus a reasonable return on his investment. Otherwise, he will

not go into it; or if changes in market or production conditions destroy any prospect of that in the future, he will probably get out of it on the best terms he can. I am assuming there that private producers of coal would figure upon a price that, barring these temporary ups and downs that affect your market or depress it, would in the long run give him back his costs and a satisfactory return on his investment.

As to whether the market price of coal influenced by such plan of depletion, interest and carrying charges as I have outlined in my discussion of case 1, I cannot speak from the point of view of one who has participated in the determination of the price of coal. But, in the nature of things, a man who would invest a certain sum in a coal deposit and begin to produce the coal from that deposit, figuring upon his engineering estimate of the extent of the supply, would include in the price he would fix upon, provided the market will give it to him, an amount that would return that initial investment over the period necessary to take it [fol. 323] out, with interest on the residual investment he has there from year to year.

I do not know whether my suggested plan of adding interest on the investment to the residual investment is used by Commercial Coal operators. The purpose here is to show how, under the order of the Commission a coal operator would have to figure his interest on residual investment in order to get back his investment at the end of the forty-year period with interest on it in the meantime at 5 per cent.

The following testimony is set out in the exact words of the witness in order that its exact meaning might appear:

Q. In substance you have stated on page 319 of your testimony, Mr. Field, that since the carrying charge each year on coal deposits would be deferred in major part to later years, this would discourage the sale of remaining deposits before the end of the period except at an enhanced value sufficient to cover the accumulated deferred carrying charges. This suggests that any plan suitable for mine accounting must be weighed in the light of possible disposal of the property, so I would like to ask you this question. What consideration should be given in determining proper mine accounting to prospective sale of the property?

A. I think the question of prospective sale enters only from the point of view from accounting for these mine operations as a source of supply for common carrier service.

If one were called upon to get up a system of accounts for an independent mine operator that consideration might not be involved.

The point is this, Mr. Funkhouser, that the cost of this coal figured upon some basis, of which I considered six possible bases here, goes into your operating expense or as a part of net operating income. Thus, in one way or another, it constitutes a burden that railway patrons must and should [fol. 324] support.

If your system or scheme of accounting for the cost of this coal taken out puts upon your railway patrons for a period a burden of carrying this and then creates a possible advantage to the carrier to dispose of its property before the coal is exhausted, you would create from the point of view of regulation of common carrier service a burden upon railway patrons for a period for which the service as a whole over the entire life of the coal would not profit. From that point of view I think the question is a pertinent one to consider.

The witness further testified as follows:

I think that the same reasoning would apply if the evidence shows that the properties were bought for the benefit of the carrier due to its necessities and not for sales because it arises in connection with a charging of the coal to the railway patrons in one form or another. I am not familiar with the recognized methods of coal mines accounting, particularly as to the treatment of the depreciation and depletion accounts. It is not my position that sound accounting methods applicable to coal mining are incompatible with proper accounting methods for mining properties of this character, whether such properties are transportation or non-transportation properties. I think the fundamental principles of accounting should govern in each case and those are mainly that you should somewhere or other recover from the user of your output the cost of providing it and a reasonable carrying charge on your investment providing it. The only possible difference, if any, would arise in connection with the fact that in this particular situation these mining properties are owned by a carrier to supply its own

needs for transportation service and therefore it introduces the interest of the patrons of its service.

In reference to the scheme of depletion outlined under [fol. 325] case 1 being sound accounting for coal mining, I do not think the principle of accounting outlined in the Commission's order has the most merit of any possible method of accounting for the coal taken out of these properties. It is my personal view that there might probably be a sounder scheme of accounting for coal mines, but, of course, in this comparative statement, I have waived all personal views and just drew up the comparative effect.

The following testimony is set out in the exact words of the witness, as otherwise its exact meaning might not appear:

Q. Do you think it is sound and business-like accounting to create an investment account in minerals in the property three-quarters exhausted at a higher figure than the original investment in all the minerals of the same property?

A. As shown in column 2 of sheet 1 of the Commission's Exhibit No. 54, the effect of adding back to the residual investment each year the carrying charges upon it to constitute the initial investment for the next year upon the depletion will be computed has the effect of increasing in a geometric ratio for a number of years the amount of the investment. That creates a constructive investment in the mineral deposits which does not agree with the pretty generally held principle of accounting for assets, that they should be taken into account at their cost and held at that amount until actually disposed of.

I can conceive of reasons, possible reasons, of expediency, for departing from that rule of accounting. Personally, this particular case does not seem to me to present sufficient reason or expediency for departing from it.

The witness further testified as follows:

And in following the order of the Commission, I have departed from the rule of accounting. I have pointed out here upon the assumed investment to start with an investment [fol. 326] from year to year which does depart from that generally observed accounting rule.

I do not know whether the method of treating the investment and depletion as called for by the order of the Com-

mission and followed in my case 1, is used by any other branch of the government including the Internal Revenue Department for the purpose of taxation.

My case 2 is a slight modification of case 1. My testimony in reference to the application of the Commission's Order and other data testified to by me as to case 1 applies substantially with equal force as to case 2. The only difference is in degree resulting from the fact that in case 2 there is included in the cost of coal charged into railway operating expenses each year not only the depletion for that year, but a part of the carrying charge on the residual investment. In case 2 as in case 1, I have made certain assumptions and certain illustrations and have attempted to picture the effect of a method of accounting assuming certain definite amounts for the factors entering into it.

I do not know whether the Commission has authority to set up any system of accounting and in such system charge such depreciation and depletion in any way it sees fit, because that really involves an interpretation of law. In the six ways of making such charges, which I have set up, I assumed that the Commission has sufficient latitude to adopt any one of the six.

The following testimony is set out in the exact words of the witness, so that its exact meaning might appear:

Q. In reference to case 3, on page 322 of your testimony you have stated in substance the railway traffic during each year would carry coal deposits for benefit not only of service for that year but also for all subsequent years, the earlier the year the greater the carrier's burden.

[fol. 327] Must not the consideration due the railway in the way of interest or rate base allowance be commensurate with a base upon the full value of the property?

A. I think that is a question at issue here with respect to these properties. In some way I would presume that during the life of such coal deposits prudently acquired for the better rendering and more uniform and steady rendering of its transportation service a carrier should get back the costs of mining the coal and a reasonable carrying charge on its investment.

At the same time, I think there is a reasonable question to be decided as to whether the manner by which it gets a reasonable carrying charge should not be worked out so as to distribute over the patrons of the service for the entire period that burden or carrying charge in somewhat relation to their benefit derived from it.

Q. Why is not the railway entitled to consideration for the first year on the full value in mineral rights of $900,000.00 less the depletion for one year in your column 2 of sheet 5?

A. The railway is entitled to receive that sum during the 40 years life of the deposit. I think, though, there is a fair question as to whether the patrons of the service during that first year should pay all of it. That is the nub of the question that arises in connection with this illustration.

The witness further testified as follows:

In case 3 of Exhibit 54, I treated the investment in plant and equipment and development, exclusive of mineral rights, separately and assigned 9.3 and 11.6 cents per ton as the return on plant and development on the assumption that the railway company is entitled to whatever the net railway operating income would otherwise be, and if it were 5% it would be this and if it was 6% it would be that.

The following testimony is set out in the exact words of [fol. 328] the witness, as otherwise its exact meaning might not appear:

Q. Why do you segregate the investment in mineral rights from the investment in plant, equipment and development and suggest that an accounting treatment is applicable to one investment but if applied to the other investment will create a "vicarious burden"?

A. In the case of plant and equipment the entire plant is all currently used in getting at the coal currently consumed, barring slight modifications. You may not be working to capacity this year, etc., but as a rule, your investment in plant and equipment is all engaged in getting out the coal for the current railway uses. In that respect it is anal-gous to your railway plant and equipment, and it is all currently engaged in rendering the current service and

the service that currently benefits from it should compensate it in full.

In the case of your investment in mineral rights the current railway service is benefitting from that only to the extent the deposits are drawn upon to meet the current needs for fuel.

At the beginning of your period of exploitation of that deposit you are carrying from year to year a very large investment that is for the benefit of service of later years. That is the distinction, I think, that exists.

Q. In that reasoning, do you take into consideration that the investment in the minerals is necessary to support the investment in the plant and equipment and development?

A. Yes. That must be assumed. You would not have the plant and equipment if you did not have the mineral rights or vice versa.

Q. With reference to your depletion charge, would it not be better in practical application in your case 3 to base this charge on a per ton basis arrived at by dividing the original investment by the estimated tonnage and applying this per ton rate to the yearly production, regardless of the amount thereof?

[fol. 329] A. As a practical matter, as I understand, that is what is done, but so far as affecting the comparison of these different methods is concerned, it makes no difference. If you were to assume, as I have done, because I had to assume something, that is, a uniform amount of coal taken out each year, then that constant amount multiplied by your per ton depletion, will give you a constant number of dollars each year, which I have used.

I think the depletion based upon a certain amount per ton and depletion in terms of an amount of money per year are translatable one into the other. It would not make any difference in this comparison which I used. If I had first taken the investment of $900,00-.00 in the mineral rights and divided that by 18,600,000 tons estimated to be in the deposit, I would get a per ton basis for depletion which, multiplied by 465,000 tons a year, would give me the figures I have used here.

The witness further testified as follows:

In case No. 4, illustrating the charge to operating expenses for carrying charges on mineral rights, plants and

development, interest is used at the rate of 5%. I had to assume some rate, of course, to make the illustration work out. I chose 5 per cent in case 4 because the carrying charges on the investment go into the price of coal charged into operating expenses and so long as the carrier earns its operating expenses that carrying charge is guaranteed. I thought it would be fair to assume a lower rate of interest in such a case than where the carrier had to assume the chance of earning its net railway operating income as in case 3. I do not claim that this is the final and exact rate of interest to which the railway is entitled in the event the property is classified an non-carrier.

In case 5 is contemplated a uniform charge each year to railway operating expenses for coal in the form of an an- [fol. 330] nuity of $52,450.38 based on a 5 per cent interest rate compounded annually. The fluctuations and variations in coal production applying in this charge would be taken care of as follows:

You would have to do as you do in all cases where you are determining an account to be applied yearly in the future based on an estimate of certain factors involved that may vary. You would start out at the date you start to apply this principle illustrated in case 5 by the best possible estimate of your coal in the ground; best possible estimate of your probable future amount of tons mined each year and knowing your investment (that would be definite to start with) you could work out on those factors an appropriate annual charge.

As the years go by, you will find, necessarily, that experience does not work just as you estimated it. You may find you underestimated or overestimated the amount of coal there. You may find the business of the railroad requires more or less than you estimated would be taken out. After an appropriate interval which you would determine from experience, say 5 years, you would recast your computations on the basis of your then known factors and recompute the annual charge to be applied for the next few years and from time to time in that manner correct it. That, of course, is what is done in computing a rate for depreciation.

It is impossible to anticipate exactly what rate you may need in order to amortize investment to operating expenses. You correct that from year to year. The same

principles apply in figuring in the insurance rate. The risk of actual experience may be different from what you anticipate but the insurance company would correct its rates. That would be my idea there. You would, at intervals, whatever is appropriate in the experience of the case, recompute and correct to the then existing ascertainable factor the annual charge necessary to take care of it and then proceed with that for the immediate future to be recorrected after an appropriate interval.

[fol. 331] I could not say whether there is any recognized or practical way of treating the depletion charge for mineral owned other than on a per ton basis, as and at the rate of mining, but assuming that there is not it would not make any difference in applying this principle because you would determine at appropriate intervals your rate per ton for depletion. The rate per ton would apply to the amount of production. Of course, as the production varies from year to year, you would have more or less total charge for depletion charge necessarily depends upon your rate of production compared with the anticipated total supply to be taken out. The charge in case 5 is only fixed for the immediate future. You could take the amount of work out here of fifty-two thousand odd and divide it by the 465,000 tons of production which I have assumed and get a fixed per ton rate of depletion. If, after five years, production is found running higher than that and that the supply would be exhausted sooner than forty years, you would have to recompute the fixed per ton depletion on the basis of the annuity computation to take care of that change in the factors.

It was primarily my purpose to show how the annuity method can be used to take care of the depletion whether computed on a per ton basis or gross amount, as here worked, in order to distribute the carrying charge on the entire investment among those who benefit from it over the entire period in a somewhat equitable manner instead of lumping it so heavily in the first years, making the service of the first years pay heavily for the carrying charges and the service of the latter years not pay for as much as they benefited from it. The purpose is to distribute the approximate burden on the rate payers equally throughout the anticipated period of coal supply.

I do not suggest such a plan for amortizing the investment in plant and equipment. I do not think it necessary because

[fol. 332] your annual depreciation takes care of that. In the plant and equipment, there is no investment carried this year solely for the benefit of ten years from now. This year benefits from the use of your plant and equipment and the benefit carries over as long as the plant and equipment last. It does not carry over solely for the benefit of those using the service later. The railway service getting the coal taken out this year with the plant and equipment benefits from the entire use of this plant and equipment this year enjoying the full benefit of that plant and equipment.

Case 5 is not applicable to investment in plant and development at the Howard Collieries; nor is it applicable to the other collieries where no minerals are owned. There is no occasion to apply this principle to those other cases. It is applicable only to cases where you have a certain investment which is to be written off in its entirety over some particular period and not renewed from year to year. This case would apply only to the Howard Colliery where the investment in minerals is about one-third of the total investment as well as I recall. If you eliminate from the market extreme variations due to speculative conditions, the annuity plan in case 5 affects about the same distribution of burden as purchasers in the open market would affect since independent coal producers would include in their prices a similar equalized element for amortizing their investment or for carrying charges, with the exception that this case 5 is on a basis solely of costs to the carrier while the coal market is determined by all the factors that affect the price of coal which may be more or less than what the costs would be. I do not know whether my annuity plan is used or has ever been used by Commercial coal producers in arriving at their per ton operating costs, and thereby their sales prices. I do not know how they determine their sales prices. I have just considered the factor that must universally be taken into consideration in any kind of a business where an investment is made that will disappear in time without renewal; that somehow or other you get back that invest-[fol. 333] ment over the period and a satisfactory return on it while it is there, and that a price from year to year based on the entire carrying charge which would require higher prices in the earlier years than in the later years, which might not be possible to collect.

I suggest in case 5 the property be classified as non-carrier, or, if classified as carrier be excluded from the rate base and carried in some kind of suspense.

Whether or not any railroad property which is properly classified as carrier property can be excluded from the rate base is a legal question. I do not know. I think that is a thing to be considered because if it is in the rate base, then you have the situation existing in my case 3 with the inequitable distribution of the carrying charges over the period.

In the valuation proceeding of the Atchison, Topeka, & Santa Fe Railroad in determining the amount of working capital allowed that carrier, the carrier made claim for the inclusion in the working capital in the form of materials and supplies for, as I recall, a little less than $2,000,000.00 (the amount is inconsequential, because the principle is what I am speaking of), for materials and supplies that had been issued from stock and charged to operating expenses and distributed along the line for immediate availability. The commission in that case took this position, that it would be inexpedient from the accounting point of view to carry such material in the material account up to the moment of its application in use, and refrained from making any charge to operating expense until actually applied. Certain operating considerations and accounting considerations make that inexpedient. As a concession to those considerations of expediency the carriers are permitted to violate the fundamental accounting rule that an asset should not be [fol. 334] charged to an operating account. Having granted that concession for that purpose, which was a reasonable concession, the commission then said: "We cannot, therefore, fairly give recognition to that asset as such again by including it in the rate base as a part of working capital." There is one instance where that kind of a consideration was involved and ruled upon. That practice has been followed by the Commission in other cases without discussion. I think here is another situation that raises the same kind of a question. The purpose, at least the main purpose of including any carrier property in a rate base is to see that the carrier is put into the position of securing, if it can earn it, a fair return on the property used and avoid what is called confiscation I think in your legal terminology. But if

a carrier is guaranteed a return on the property in some other way than by inclusion in the rate base the object is obtained and it may be possible in some such manner as I have suggested here to do that thing. If the investment in these coal deposits be found to be held for carrier purposes, and therefore, are carrier property, but in view of the fact that to include them in the rate base would unreasonably burden current railway services with carrying that part of the investment which was to be carried over for later years then if you can devise some accounting plan whereby the entire investment is put in a suspense of some sort and there is included in operating expenses and, therefore, permitted to the carrier if its traffic earns the operating expenses, a return that will by the time that investment is exhausted fully compensate it for its investment during that period, it will be in the same position as if it had had it in the rate base all the time with a diminishing amount.

What I mean to say there is that the question of confiscation to which the question of classification of property as [fol. 335] carrier or non-carrier mainly goes, is one that has two sides to it. On one side is the value of the property on which earnings are to be computed. On the other side is the amount of the earnings and the interest, which can be secured either by recognizing it in a rate base or in the earnings.

I am speaking now not from a legal point of view but from the pure economics of it there.

I do not understand that there was any agreement in the Atchison, Topeka and Santa Fe Railway case between the government and the carrier as to how much was to be charged, etc. That situation grew out of the fact that the classification of accounts permits that to be done and most carriers do it. Any question as to the proper classification would be decided by the Bureau of Accounts.

In case 6, the same suggestion is made, that is, that the property be considered as non-carrier or, if considered as carrier, be excluded from the rate base. It would come to a situation where the carrier would be engaged in the coal mining business solely for its own purpose just the same as any commercial operator and would earn or lose money according to whether the cost of production was above or below the current market price, and would be in the same status as any private coal produced so far as its chance of

gain or loss was concerned. I don't think that it follows that it would be necessary that all purchases and investments of the railway company in any property or equipment for the benefit of railway service be weighed in this balance of profit and loss in arriving at an accounting plan.

The proposition here assumed is that the carrier owns these mines not that it is buying its coal from the outside. The question is how will it account for that coal as it takes it into its operating expenses. If it is done by putting a price on the coal to determine the basis of the ouside market [fol. 336] for coal then these observations follo. :

I do not know by whom and how the market prices would be determined, that is one of the difficulties in applying that plan.

In the six cases which I have discussed the item mainly discussed and suggested in the different schemes of accounting is the investment in mineral rights as a principle and while it is not limited to the Howard Collieries it happens to be in this carrier's case the Howard Colliery. I understand that the carrier has no investment in mineral rights at the other two collieries. A uniform plan in all cases is prescribed for the investment in plant and development of the Howard Collieries. It would seem to me that the mine operating costs and the carrying charges on plant and equipment and the question of depreciation for that and the renewals from year to year and replacements and so on will present the same factor in any of these cases cited.

I think the accounting for the carrier's investment at the other collieries would be handled by setting up if it is classified as carrier property, it goes into some appropriate account in the classification for investment in road and equipment and it would be subject to credits, retirements and additional charges for additions and betterment and the operating expenses would be charged for the depreciation on it with renewals of it just as any other road and equipment property and the value of it at any date in question would go into your rate base with the other road and equipment. It would be handled in the same way as the plant and equipment at the Howard Collieries. On the other hand, if it is classified as non-carrier, it would be carried in the same kind of a non-carrier investment account and all those factors, the carrying charges on it and the depreciation would

go into the price of the coal that would be charged to operating expenses.

[fol. 337] As to whether or not the putting into effect any of the six cases with the exception of case three would necessitate material changes in the railroad's present accounts and affect on railway earnings and income for many years, I think the same question would arise, even, in connection with case 3, because as I understand this property is not now in 701 and you would have to start with entering it there at some specific date. While the return on it up to that date and the depreciation of it up to that date would have to be taken care of in some way or other in the interest of your stockholders to be worked out. I do not think the question of the date you would start any of these plans that might be adopted would make any difference with the comparative merits of selecting them because you have that same question to deal with in all of them and it should be worked out in consideration of fairness, I suppose, to the carrier, for the time that has passed.

In case 3 no carrying charge is included in the price at which the cost is charged to operating expense. So if that case were put into effect then the arrangement would affect the net operating income from the time it was put in because thereafter the return on this part of the investment in carrier property would be a charge against earnings in net railway operating income. The costs of operating these properties, mine operating costs and depreciation of plant and equipment and everything are charged to the railway expense just as if the property was transportation property, but what I am speaking of is the return on your investment in these properties. You now have that, as I understand, in miscellaneous physical property and lodged there and classified as non-carrier property, it would not receive recognition in any determination of your net railway operating income. It would not be included in the rate base into your railway operating income. In other words, [fol. 338] what I am talking about is some charge anal-gous to a return on the property.

As to whether or not it would be absolutely impossible or impracticable to classify these mining properties as carrier property because of the accounting difficulties it seems to me that whether this is classified as carrier or non-carrier a system of accounting for the entrance of the coal

into operating expenses or net railway operating income could be worked out that would be fair to railway patrons over the entire period the coal deposits last so that there is nothing in the accounting with respect to the investment in coal deposits that would require the investment to be classified either one way or the other, provided if it is classified as carrier, the principle I refer to as being recognized in the Santa Fe case is given application in some manner that would not put the entire carrying charges on the investment in the coal properties against the current railway patrons who benefit only from the current use and who would thereby bear the burden of carrying a reserve for patrons in later years. I do not see any insuperable difficulties and obstacles from the accounting end that would prevent this property being classified either as carrier or non-carrier according to law. I think accounting can all be worked out to meet the facts. It may be more complicated in some cases than others. It may involve certain compensating concessions, but so far as my assuming that accounting procedure in the case of railroads goes in my work with the commission as to studies I have made I think accounting can always be worked out to meet any particular state of facts that you want to keep a record of. But you may have conditions where it is preferable to treat your facts this way in one case and this way in another. I understand that accounting should follow classification but that is a question of law. I think it is true that accounting should be made to fit the conditions instead of the conditions made [fol. 339] to fit the accounting because accounting fundamentally is designed to record what happens to your enterprise with the investment you got and the business you do. You must start off with some postulation as to what your investment is and what your business is. As to the legal aspect of it, I do not pretend to answer, answering only from the accounting aspect.

The following testimony is set out in the exact words of the witness, as otherwise, its exact import might not appear:

By Mr. Funkhouser:

Q. I intend to ask you from the accounting aspect.

A. Accountants often, though, have to conform to the law. If I may be permitted, Mr. Examiner, perhaps I

ought to add a comment there. I am familiar with Mr. Barnes' position on that matter which I think I am correct in saying rests fundamentally upon the question of legal interpretation, as to what legal force and effect the Commission's classification has, and, if he is correct in that legal interpretation then what he contends for must follow. I say nothing as to that question in my answers at all. I do not know about that.

[fol. 340] Redirect examination:

Q. You were asked whether or not there would be any insuperable difficulties in accounting for these coal mines in the case they were classified as common carrier property. Will you please give your opinion as to whether or not the accounting would or would not be rather complicated in case they were so classified?

A. I think I answered that substantially in the negative because the word "insuperable" is a pretty farreaching word. There may well be, however, some difficulties, perhaps extreme difficulties in working out a scheme of accounting in case the property is classified as carrier that would secure the results that I have indicated should be aimed at here, namely, the equitable distribution of the burden of carrying the investment in coal properties over the service benefitted from the entire period.

As to that I would not undertake to testify in detail because I am not familiar with the detailed accounts that have to be worked out leading up to the major primary accounts that enter into the classification. I would not undertake to say whether there would or would not be great difficulties or complications, but it seems to me as I said in the first place, when he put the question whether or [fol. 341] not there were insuperable difficulties, that accountants, as a class, are competent men. You can work out something even though it be complicated.

Rebuttal Testimony on Behalf of Carrier

F. G. Minter was called as a witness on behalf of the Norfolk & Western Railway Company and, being duly sworn, testified as follows:

I live in Roanoke, Virginia and am employed by the Norfolk & Western Railway Company as Special Agent in

the Comptroller's office. I have been in the employ of the Railway Company since 1910 and in the Comptroller's office since 1918. For the past several years, I have been employed in special work assigned by the Comptroller, some of which duties were and still are to prepare annual reports to the Commission and various states, to compile Federal Income Tax Reports, audit affiliated corporation accounts including the mine operations and various other duties pertaining to the corporate history and accounting reports and matters of valuation.

All of these duties require general knowledge of the accounting classifications prescribed by the Commission. I am classified as special agent which pertains to accounting matters and have done accounting work. I handle the accounts that have been assigned to me, or duties that have been assigned to me in accounting matters by the Comptroller. I am familiar with the accounts of these mining properties. The railway company handles the investment and cost of operating the Howard, Vulcan and Pond Creek Collieries on its books as follows:

The investment in the mining rights, leaseholds and mining equipment are carried in the carrier's general books in general balance sheet account No. 705—Miscellaneous physical property. The operating accounts, consisting of office cash, material and supplies, shop expense, workmen's [fol. 342] compensation, store stock and other unadjusted items are carried in the railway company's balance sheet accounts, viz:

715—Miscellaneous accounts receivable.
716—Material and supplies.
727—other unadjusted debits.
760—audited accounts and wages payable.
771—Tax Liability.
777—accrued depreciation, including depletion.
778—other unadjusted credits.

In the Norfolk & Western Railway Company's annual operating reports to the Interstate Commerce Commission the revenue and expenses are cleared through Income Accounts Nos. 502, 511, 534, 535 and 544, all of which accounts pertain to the operation of miscellaneous physical properties and to some of which further comment will be made later on in my testimony.

The Railway Company operates other plants, the products of which are used in transportation service and the costs of which property are included in road and equipment account No. 701. For illustration: Tie treating plants, electrification operations and water-softening plants.

In the investment account of water-softening plants, or water-purifying plants, such items as dams, reservoirs and permanent water rights are included as part of the cost of the project. The same general principle is applied in classifying tie treating plants and electrification operations, all of which are more fully described in accounts 17, 18 and 28 to 34, inclusive, of classification of investment in road and equipment of steam roads approved by the Interstate Commerce Commission, effective July 1, 1914.

The accounts of these operations with the exception of [fol. 343] water-softening plants are kept in separate clearance accounts by the railway company as is done in handling the account of the mining operations and the balances appearing in each account at the end of the accounting period are in due course charged to construction, material and supplies or to the primary operating expense account. The several items constituting the entire plant cost of each of these properties are specifically classified as one composite unit of property in road and equipment accounts prescribed by the Commission. The accounting classification as prescribed by the Commission does not meet the requirements of the railway company and provide the necessary accounts for the operation of its collieries as physical property devoted to transportation service.

The classification, as it now provides, does not permit investment in coal mines including mining rights, leaseholds and mining equipment to be classified and placed in the road and equipment accounts as physical property devoted to transportation service. To meet the present situation of the railway company and the requirements of section 15-A of the Act a change in the accounting rules is apparent.

The commission has been charged with the duty of making an inventory and of classifying the property of every common carrier as provided for in paragraph (a) of section 19-A of the Act which reads in part as follows:

"The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission."

[fol. 344] As stated in the foregoing quotation, the Commission has been charged with the duty of classifying the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment as prescribed by the Commission. There is nothing in section 15-a or 19-a, so far as I have been able to learn indicating that the carrier should be penalized through the exclusion of properties devoted to or used in transportation service, because there is no specific account in classification of road and equipment for steam roads in which may be included the investment costs; also because no other comparable properties are owned and used in transportation service by other carriers, or for purposes of the Commission comparisons may be destroyed or distorted.

In stating in my evidence, in effect, that to meet the present situation of the railway company in requirements of Section 15-A of the Act a change in the accounting rules is apparent, I meant it as necessary in order to record the facts as they exist today. I did not mean to say that they had been changed and it could be seen they had not been changed.

Should the Commission classify the Collieries as carrier property devoted to transportation service then to meet the requirements of Section 15-A and 19-A of the Act, I would recommend for a change in the classification of investment in road and equipment for steam roads to provide the proper accounting as follows:

The appropriate primary road account (either 17, 35 or 43, or such other account as may be prescribed), in classification of investment in road and equipment of steam road could within the discretion of the Commission, be amended to provide a similar provision, including collieries, as that shown in Item 22, investment in sand, gravel [fol. 345] pits and quarries described on pages 50 and 68 of Railway Accounting Officers' Assocaition Bulletin No.

113, outlining the tentative revision of accounting rules for steam roads. The tentative rules which have been drawn substantially to meet the requirements of Sections 15-A and 19-A Interstate Commerce Act and depreciation Order No. 15100, were offered in evidence by witness for the Bureau of Accounts in Ex-parte 91, at a recent hearing before Division Four of the Commission.

The Plan of handling investment in Sand and Gravel Pits and Quarries is as follows, viz:

"22. Sand and Gravel Pits and Quarries.—

"When the products from the pits or quarries are to be used for construction *of* maintenance, this account shall include the value of sand in sand pits, gravel in gravel pits, and rock in quarries, and the costs of improvements therein, including tracks, building, machinery and tools.

"There shall be credited to this account, monthly, and charged to the appropriate clearing account, provided in accordance with instructions 213 (reproduced below), the monthly depletion of investment in this account. The depletion charges shall be reckoned on the ratio of the monthly production to the total estimated production of the pit or quarry."

The Instructions contained in paragraph 213 are as follows, viz:

"213. Sand and Gravel Pits and Quarries.—

"When a sand or gravel pit or a quarry is acquired for operation likely to extend over a long period there shall be charged to account 22, "Sand and gravel pits and quarries";

[fol. 346] (a) The estimated cost of the sand and gravel in the pit or rock in the quarries.

(b) The amount paid for the right to enter upon and remove material from the property of others.

(c) The cost of sinking test holes.

(d) The cost of clearing, stripping, ditching and draining the land and of removing or changing fences, preparatory to opening the pit or quarry.

(e) The cost of labor expended and material consumed in constructing buildings.

(f) The cost of rails, ties, and ballast and other material and labor of installation.

(g) The cost of machinery and expenses of installing same and of small tools of all classes.

"For each such sand or gravle pit and quarry there shall be designated Operation of sand pit * * *," "Operation of gravel pit at * * *," or "Operation of quarry at * * *." To these accounst shall be charged each month:

(a) The depletion in the investment in account 22, "Sand and gravel pits and quarries". These depletion charges shall be reckoned upon the basis of the ratio of the output in the month to be estimated total material in the pit or quarry.

(b) The cost of labor and switching service expended in producing, quarrying and loading material, and the cost of repairs to the machinery, tracks, and buildings in the pit or quarry.

(c) The cost of explosives, additional small tools and miscellaneous expenses.

[fol. 347] "Each such account shall be cleared each month by crediting thereto the cost of the material produced. This credit entry shall show the quantity of material produced during the month and the total cost of production. The amounts thus credited to this account shall concurrently be charged, according to the purpose for which the material is used, to the appropriate road and equipment or operating-expense accounts or to account 717, "Material and supplies." If any portion of the product from the pit or quarry is sold, the proceeds from the sale shall be accounted for through account 717, "Material and supplies," except that the profit over the cost of production shall be included in account 141, "Miscellaneous."

The changes from the present method of accounting which would take place in the carrier's account if the Commission should approve the plan I have proposed and the investment in plant accounts be transferred to account No. 701 would be as follows:

The entire cost of operation would be charged to "open account" and miscellaneous income from operations credited to "open account" the net of which, each month, would then be cleared to either materials and supplies or the appropriate railway operating expense account. The investment would be transferred to account No. 701 and reduced monthly with the depletion and depreciation accruals reckoned on the basis of production, whereas at the present time the accruals are credited to balance sheet account No. 777—accrued depreciation—Miscellaneous physical property with no corresponding reduction in the investment. With these exceptions, the accounts at the present are handled in the same manner as provided for in my recommendation.

[fol. 348] Under the plan which I have proposed the collieries would be included in the rate base, thus eliminating any theoretical method of including in operating expenses a return on investment; a change in our present practical plan of depletion of depreciation amortizing the investment, and the necessity of fixing prices of fuel coal produced at its mines at current commercial prices for similar grades of coal. My plan would also discourage the building up of fictitious profit reserves from operating the collieries in competition with current market prices, taking into consideration the fact that we have heretofore produced our fuel coal at less per ton cost than prevailing per ton prices of commercial coal.

Such a plan of accounting as proposed by witness Barnes is entirely new in railroad circles, and to my mind opens the way for the abuse of sound accounting principles. Furthermore, in all probability such a plan would destroy one of the fundamental principles contained in the classification which provides that "the accounting shall be as nearly as practicable upon the basis of accruals" and at actual costs.

The Bureau of Accounts has examined the accounts of the Norfolk & Western Railway Company, as reflected in its return filed in response to the Commission's orders for the accounting periods of four months ended December 31, 1920 and for the twelve months' period ended December 31, 1921 to 1926, inclusive.

In their report of the examination of the accounts for the periods just mentioned, the Bureau of Accounts took no

exception to the present method of handling depletion and depreciation accruals or any other accounts pertaining to mining operations, except for the handling of miscellaneous income from mining operations credited to Income Account No. 511 and such exception is contained in letter from [fol. 349] Mr. Alexander Wylie, Director, Bureau of Accounts, dated May 31, 1927. File D. C. 3908-R pertaining to accounts for year ending December 31, 1921:

The exceptions referred to as taken by the Bureau of Accounts directing a change in the method of handling the miscellaneous income from mining operations brings the entire income and expense of operating the collieries within "net railway operating income" as defined by the Act, and therefore no inconsistency will exist should the value of collieries be included in the rate base and in the carrier's road and equipment accounts as properties devoted to transportation service.

In reference to the investment in coal and other mines which under the present classification are required to be carried in General Balance sheet account No. 705, it is recognized that the Commission is charged with the duty of establishing accounts which shall classify the property "held for and used in the service of transportation" from that of property used for other purposes, but from the facts presented, it is obvious that the rules providing for the classification of such properties as miscellaneous physical property do not correctly record the present existing conditions as called for in section 15-A.

The general practice of the carriers, operating through rich coal fields, was, in the past, to heavily invest in coal properties and operate them for commercial purposes. In recent years the carriers have been forced to divest themselves of those investments. 238 U. S. v. D. L. & W., 516-537.

It is apparent throughout the evolution of general balance sheet account No. 705, Miscellaneous physical property, that in classifying coal mines as such, the controlling principle has been that they were operated for commercial [fol. 350] purposes. This fact is borne out in the Railway Accounting Officers Committee reports and circulars and orders issued by the Commission, excerpts from which are as follows, viz:

The Commission's Accounting Series Circular No. 21 of January 11, 1908 formally called attention to the problem of a balance sheet:

"Having requested criticisms and suggestions from carriers relative to the method of reflecting or reporting the results of their operations for a current period through the medium of an Income Statement and of the final results from origin and the end of the period for which made through the medium of a profit and loss statement, the attention of the Commission is now directed to the consideration and study of the Balance Sheet * * *."

A brief Balance Sheet was submitted as a basis for discussion and the whole circular was reprinted in the Association's Bulletin No. 30-A, dated January 15, 1908.

By resolution in April, 1908, the Association deferred action upon a balance sheet to permit further study (23rd Rept., p. 206 of Bulletin 32-A, May 20, 1908).

In January, 1909, the Association's standing Committee on Corporate, Fiscal and General Accounts resolved:

"That the Committee proceed to the formulation of a tentative Balance Sheet, and that in its formulation the requirements of the Interstate Commerce Commission be not considered" (Bulletin No. 32-A Jan. 25, 1909, P. 2).

In February, 1909, the tentative balance sheet and text [fol. 351] was submitted. The text for Account No. 7, other permanent investments, reads:

"Under this caption should be grouped the investments of the respondent carrier in properties not used for railway purposes or outside operations, such as coal and other mines, timber lands, saw-mills, hotels (not a part of railway property) with their furniture and fittings, buildings and property used for commercial purposes, land scrip acquired for the purpose of locating upon and securing title to public lands and other property that has been acquired in anticipation of future necessity or use, but which is not at present a part of the carrier's property that is used in carrying on its transportation business or outside operations. This also includes investments in the securities of steamship lines, express companies, etc., when it is

necessary or desirable for the respondent company to control or be interested in such enterprises, provided they be not considered 'Marketable Securities' (Account No. 10). This caption should also include securities not provided for in accounts Nos. 3, 4, or 5 that may be pledged in connection with 'Mortgage, Bonded and Secured Debt' (Nos. 26 and 30), also investments in property the title to which is not held by the respondent corporation nor any securities held to cover same when such property is not used for railway purposes; it also includes memberships in Board of Trade and other commercial or business organizations." (Bulletin No. 35-A, P. 9, March 6, 1909; Bulletin No. 26, [fol. 352] P. 7, March 8, 1909.)

Bulletin No. 35-A contained minutes of the Buffalo meeting of the Standing Committee on Corporate, Fiscal and General Accounts at which Mr. Henry C. Adams of the Commission was present. Bulletin No. 36-C of April 19, 1909 transmitted to the Committee Mr. Adams' letter of April 14, 1909, which read in part:

"Since the meeting of the Committee * * * recently held at Buffalo, I have again gone over the whole question of the Additions and Betterments Classification and the Balance Sheet with its accompanying text. Thinking that you might be interested in the result of this final study, I send you the accompanying documents.

* * * * * * *

"Exhibit B.—This exhibit covers in detail all the changes which have been made in the Balance Sheet approved by the Committee * * * at Buffalo, and the reasons therefor. Some of these changes are matters of taste; others are rearrangements which on the whole seem to satisfy a large number of balance sheet requirements, and some are required by certain general principles which seem essential to the Commission.

"Exhibit C.—This exhibit is the modified balance sheet with the accompanying text. * * *

"'Other Permanent Investments' appeared in the modified balance sheet as Account No. 5 (Bulletin No. 36-C, P. [fol. 353] 14-15) the text reading:

"Under this caption should be grouped the investments of the respondent carrier in properties not used for railway purposes or outside operations, such as coal and other mines, timber lands, saw mills, hotels (not a part of the railway property) used for commercial purposes, land scrip acquired for the purpose of locating upon or securing title to public lands, and other property that has been acquired in anticipation of future necessity or use but which is not at present a part of the carrier's property used in carrying on its transportation business or outside operations. This also includes investments in the securities of steamship lines, express companies, etc., when it is necessary and desirable for the respondent to control or to be interested in such enterprises for the purpose of maintaining the integrity of its transportation system, provided they be not considered 'Marketable Securities' (Account No. 7). This caption should also include securities not provided for in Account Nos. 2 and 3, that may be pledged in connection with 'Mortgage, Bonded, and Secured Debt' (Nos. 27 and 31), also investments in property, the title to which is not held by the respondent corporation or any securities held to cover same when such property is not used for railway purposes; it also includes memberships in boards of trade and other commercial and business organizations, (when it desired to retain the identity of the [fol. 354] account on the company's books—Chairman).

"Amounts reported under this caption shall be classified under the subheadings: (a) Physical Properties; (b) Securities."

Bulletin No. 36-D presented the Association Committee's recommendation in preceding quotation from Bulletin No. 35-A (see P. 9 of this Memo) and the Commission's recommendation just quoted in parallel columns, page 8.

The Commission issued its Form of General Balance Sheet Statement in an order dated June 21, 1909, the text regarding Account No. 6, Other Permanent Investments, reading:

"(a) Physical Property.—This account should include investments in property not used for railway purposes or outside operations, such as coal and other mines, timber lands, saw mills, hotels (not a part of the railway prop-

erty) with their furniture and fittings, buildings and property used for commercial purposes; land scrip acquired for the purpose of locating upon and securing title to Public Lands; investment in property not used for railway purposes and for which no titles or securities for titles are held; and other property that has been acquired in anticipation of future necessity or use, but which is not at present a part of the carrier's property used in carrying on its transportation business or outside operations.

"(b) Securities.—This account should include invest-
[fol. 355] ments in the securities, etc."

Bulletin No. 37-A of October 15, 1909 stated "While a form of balance sheet has been promulgated, it is the understanding of the chair it is open for further consideration" (P. 1). Bulletin No. 40 of March 21, 1910 recommended certain changes but none with regard to Account No. 6—Other Permanent Investments.

The first revised issue of the Commission's "form of general balance sheet statement" was issued on May 31st to become effective June 15, 1910, Account No. B 6, now entitled "Miscellaneous investments" reading:

"(a) Physical Property.—This account should include investments of a permanent nature in physical property other than that held for operation of the company's property as a transportation agency. It should include such items as investments in coal and other mines, mineral and timber lands, saw mills, and other manufacturing plants, lands — other property acquired and held in anticipation of future use, second-hand and other rails and track material leased to industries or to tram and other roads not owned or controlled by the respondent company, buildings (not used in transportation operations) held for rent, and other property, not a part of the company's plant for the maintenance and operation of the property devoted to furnishing transportation and facilities incidental thereto.

[fol. 356] "(b) Securities—Pledged.—This account should include investments not provided for in accounts B 2, B 3 and B 4, etc. * * *.

"(c) Securities—Unpledged.—This account should include investments, not provided for in accounts B 2, B 3 and B 4, etc." * * *

In the tentative form of income and profit and loss statement next considered by the Association and the Commission, Account No. I 23, "Deductions for miscellaneous investments—physical property" stated:

"This account should include the net debit balance of the revenues from, and the expenses (including taxes) of, physical property carried in general balance sheet account B 6 (a), 'Miscellaneous investments—physical property'."

Balance sheet accounts next came up for extended consideration in 1913. Bulletin No. 67 of November 7, 1913 stated, "The classifications as drawn appear in the appendix in printer's type and the corrections or suggestions made by your Committee appear in typewriter type * * *." No suggestions or corrections were made regarding Account No. B 3—Miscellaneous physical property, which read:

"This account should include the accounting company's investments in physical property other than investments properly classable in accounts B 1 A, B 1 B, and B 1 C.

[fol. 357] Items of Investment

Coal and other mines, mineral and timber lands, lands and other property acquired and held in anticipation of future use, rails and other track material leased to others, land and buildings not used in transportation operations, saw mills and other manufacturing plants."

The same Bulletin contained under the heading "Unification of the Titles and Grouping of the Operating Expenses and Road and Equipment Accounts," the following resolutions (P. 3):

"(8) Resolved, That the balance sheet follow (previous named accounts) and that the numbers be as follows: 601-650—Assets; 651-700—Liabilities.

"(9) Resolved, That the Auxiliary Operations follow: the numbers to commence with 70i."

Hence the next tentative text (Bulletin 70, April 11, 1914) "Miscellaneous physical property" appeared as Account No. 705, reading:

"This account shall include the accounting company's investments in physical property other than transportation property assignable to accounts Nos. 701 and 702.

Items of Investment

Coal and other mines, Lands and buildings not used in transportation operations, SUCH AS—Mineral and timber [fol. 358] lands—Saw mills and other manufacturing plants, Lands and other property acquired and held in anticipation of future use."

The large type indicates a suggestion made by the Association.

Account No. 705, Miscellaneous Physical Property as finally promulgated in the General Balance Sheet Classification of 1914 issued May 19, 1914, effective July 1, 1914, reads:

"This account shall include the accounting company's investment in physical property other than transportation property assignable to accounts Nos. 701 and 702, including hotels, restaurants, commercial power plants, etc., which are entirely distinct from transportation property and are not operated in connection with the transportation service of the accounting company.

Items of Investment

Coal and other mines, mineral and timber lands, commercial power plants, rails and other track material leased to others, hotels and restaurants, lands and buildings not used in transportation operations, saw mills and other manufacturing plants not operated in connection with transportation service, land and other property acquired and held in anticipation of future use."

As previously stated elsewhere in my testimony, these rules were formulated prior to the period when the carriers [fol. 359] were forced through a decision of the United States Supreme Court (U. S. v. D. L. & W., 238; 516-537, and prior decisions referred to therein) to divorce themselves of undertakings in contravention of the commodities clause of the Interstate Commerce Act and/or the Sherman Act.

No accounting rules have been prescribed by the Commission which will allow the petitioner to record in its accounts the conditions as they exist today, and be consistent with the requirements of sections 15-A and 19-A of the Act.

It is my understanding that the coal properties just referred to were the properties held by the railroad companies and used for commercial purposes when the rules just referred to were made. It is my position that the testimony I have just given supports that conclusion. It is my conclusion that when the present classifications and rules were made, the accounting rules as they are written do not record the facts as they exist on the Norfolk & Western Railway Company I cannot say what the Commission had in mind at that time.

Cross-examination:

It is substantially true that the Norfolk & Western acquired approximately 3800 acres leasehold interest in fuel coal. The Norfolk & Western controls the Pocahontas Coal & Coke Company, which is a holding company that owns coal lands but which does not operate any of the properties. I have no estimate of the coal lands owned or held by the Pocahontas Coal & Coke Company. I do not know whether or not the employees of gravel pits, treating plants and electrical operations are or were subject to the jurisdiction of the Railway Labor Board; nor do I know whether they or the employees of these mine operations are [fol. 360] entitled to receive passes; nor do I know whether the employees of the mine operations are subject to the jurisdiction of the Railway Labor Board. I have never been able to find that any other carrier owns coal mines in the same way that the Norfolk & Western owns its mines at the present time.

My purpose in referring to the manner in which gravel pits are accounted for was to show that the present classi- [fol. 361] fication might be amended to provide for the entire investment in our coal properties to be so included in Account 701. It is not my impression that the entire investment in gravel pits necessarily finds its way into Account 701, under the present classification. Under our present classification if material is removed from sand or gravel pits and the gravel is used for construction pur-

poses it finds its way into Account 701. If not, it finds its way into operating expenses or into any other appropriate account and the balance unused in the gravel pit is not, under the present classification, in our capital account. If we confine ourselves to the present classification, the value of the gravel pit is not included in the rate base.

GEORGE DUNGLINSON, JR., recalled, testified on direct examination as follows:

I am familiar with and have had experience with accounting procedure applicable to coal mining. For several years, I was in the accounting department of a corporation owning and operating coal mines and occupied positions from payroll clerk to accountant. For nearly twelve years I have been in charge of the coal mines of the Norfolk & Western Railway Company, in which capacity I have had charge of the accounting of these properties. I am a graduate Engineer with a Degree of Bachelor of Science in Mining Engineering from the Alabama Polytechnic Institute.

I heard the testimony of Mr. Field in this hearing and have subsequently read the transcript of his testimony and have studied the exhibits introduced by him.

The witness Field has introduced six methods of accounting which he says are susceptible to use in accounting for the investment and operation of the petitioner's coal properties. Four of the methods or cases are illustrated with tabulations. I will discuss briefly and comment on each [fol. 362] case as defined by the witness.

Case 1: In this case the witness considers the property is classified as non carrier under the provisions of the Commission's order of January 14, 1928. In this order the Commission directs that the carrier's investment in the Howard, Vulcan and Pond Creek Collieries shall be classified as investment in non carrier property and included in the balance sheet account 705, Miscellaneous Physical Property. That annually there shall be added to the cost of these properties and included in this account, interest upon the residual investment reckoned at fair interest rates, but not in excess of the rate of 6 per cent per annum, the amounts thus

charged to be concurrently credited to Account 515, Income from Unfunded Securities and Accounts.

Please note that the order directs that the carrier's investment in the Howard, Vulcan and Pond Creek Collieries shall be classified as investment in non-carrier property, and that annually there shall be added to the cost of these properties interest upon the residual investment, which interest and investment shall be included in balance sheet account 705.

The witness however in applying this order in his case 1 confines the treatment to the investment of $900,000.00 in mineral rights. He does not add to the cost of plant and equipment any interest on residual investment. He treats investment in plant and equipment in an entirely different way and not in accord with commission's order.

The Commission further ordered that the monthly charge for depletion shall be upon the basis of such rates per ton as will as nearly as practical extinguish the investment in the property (less salvage) during the period in which the coal owned by the carrier is mined.

The only investment mentioned in the order is the carrier's investment in the Howard, Vulcan and Pond Creek [fol. 363] Collieries. Therefore, that part of the order just quoted which deals with the depletion charge must be applied to the full investment and not merely to a part thereof.

Therefore, for these reasons the tabulations, explanations and comments of the witness under Case 1 are partially misleading and not illustrative of the accounting results which would follow the application of the Commission's order.

The witness in his Case 1 has assumed a uniform rate of mining for 40 years, or a rate of 465,000 tons per year. Coal from the boundary in which the minerals are owned is not being mined at a uniform rate per year. For instance, the production was 279,000 tons in 1918, 428,000 tons in 1923 and 228,000 tons in 1927. It will probably be around the last mentioned rate, between 200,000 to 250,000 tons, for the next 10 years.

Therefore, the assumption of regular mining of 465,000 tons per year is not in accord either with conditions actually obtaining in the past or the forecast for the future. The use of the actual annual production in place of the assumed uniform annual production would materially change all the figures of the tabulated results shown on sheets 1 and 2 of his Exhibit No. 54.

The witness uses 9.3 cents as being the per ton charge for return on plant and development. He applies this charge without change during the forty years assumed life of the property and justifies same by assuming that the depreciation charge each year will be properly accounted for in operating expenses and that renewals from time to time will maintain the investment in these items at about $900,000.00. This is an incorrect assumption.

The investment in plant and development will not be maintained at a regular figure during the life of the property. [fol. 364] The application of the depreciation charge always tends to reduce investment, the only offset being charges for additions and betterments.

There must necessarily be a marked and fairly regular reduction in this investment item during the last ten or fifteen years of life. Otherwise, the entire investment of $900,000 would have to be charged off in the last year.

An outstanding accounting feature, however, in the treatment under case 1 is the plan of adding to the investment in mineral rights of $900,000 interest upon the residual investment by which process the original investment is increased from $900,000 at the beginning of the first year to $1,193,983.98 at the beginning of the 20th and 21st years, after which a gradual reduction takes place, but is still over $900,000 at the beginning of *of* the 32nd year and there is a residue of $150,856.90 at the beginning of the 40th year.

Such a plan of accounting is illogical and contrary to methods applicable to the coal industry. Coal mining is a wasting industry. The investment in coal property, whether in minerals, plant or equipment, is potentially reduced through the extraction of each ton of coal. The coal becomes a detached product as soon as it is extracted and it naturally follows that whatever the land or mining rights were worth at any time it is worth after the extraction an appreciable less amount.

[fol. 365] It is incomprehensible that after we have mined three-fourths of the recoverable tonnage the remaining one-fourth would have an investment cost more than the investment for all the tonnage at the beginning of mining. Such a plan would place a burden on the remaining coal beyond its economic value and under normal conditions beyond its minable value, which would probably force the operation to cease work before the property was exhausted.

It is fully recognized in the mining profession that during the last five or ten years life of a coal property, such as is herein involved, the production falls off and the mining costs increase.

It is also fully recognized in the mining profession that the coal remaining in a property after three-fourths or so of the property has been exhausted is not as valuable as the coal extracted in the full bloom of operation.

A commercial company following such a plan of accounting would find itself in the dilemma of having an investment account at some time in its career which would be unextinguishable through charges to operating accounts and would either have to go out of existence with some of its assets unredeemed or charge such assets against accumulated surplus.

Now, we will discuss case 2.

Under case 2, sheets 3 and 4 of Exhibit No. 54, the witness outlines a plan of accounting which he says is a slight modi- [fol. 366] fication of the Commission's accounting order of January 14, 1928, the modification being that the interest on the residual investment in the $900,000 item of mineral rights instead of being charged solely to the investment be divided partly to the investment and partly as an operating expense. The part charged as operating expense is 5 per cent on the current depletion ccharge.

The amount of the interest charge to operation increases each year from $1,125 the first year to $6,148 the 39th year, the total interest chargeable to operating expenses for the 40 years being $120,690, compared with a total of $1,636,792 chargeable against investment.

The net results of this plan of accounting is very slightly different from case 1 and differs only in this modified way of treating the interest on residual investment.

In case 2, as in case 1, the witness confines the instructions of the Commission that "there shall be added to the cost of these properties and included in this account" interest upon the residual investment" to that part of the investment in the properties which is represented by the item of $900,- 000 for mineral rights.

He does not add to the cost of plant and equipment any interest upon the residual investment therein but treats the investment in plant and equipment in an entirely different way and not in accord with the Commission's order.

[fol. 367] Therefore this case is misleading in that it is not a modification to the extent claimed of the Commission's order. It is fully subject to my criticism of case 1 in reference to incorrect assumption of uniform rate of mining for 40 years.

It is fully subject to my criticism under case 1 of incorrect assumption of a uniform investment in plant and development by which incorrect assumption a uniform charge of 9.3 cents per ton is used to represent return on plant and development.

It is with only minor modification subject to my criticism under case 1 of the illogical and unbusiness-like plan of adding to the investment of $900,000 in mineral rights the interest upon the residual investment.

Case 3: In case 3 the witness assumes the property is classified as carrier and included in the rate base. The tabulated effect pictured by the witness under this tabulation and his comments thereon are subject to the following criticism:

Witness says (page 322) that the railway traffic during each year would carry coal deposits for benefit not only of service for that year but also for all subsequent years, the earlier the year the greater this vicarious burden.

He states that this creates a burden in the earlier years for the benfit of the later years.

[fol. 368] The railway, in my opinion, is entitled to full return each year on its investment in the mining properties, and while the railway has a larger investment in the properties at the beginning it is entitled currently to full consideration for that investment.

In later years the investment is reduced through depletion and depreciation deductions; therefore it is entitled in the later years to a lesser consideration.

It should be noted that here again the witness treates the investment in plant and equipment and delevopment (exclusive of mineral rights) separately and assigns 9.3 and 11.6 cents per ton as the return on plant and development.

Apparently the railway company is entitled to full current consideration for its investment in plant and equipment, but if similar consideration its investment in mineral rights a vicarious burden results and the traffic carriers charges for future benefit.

Witness calculates the depletion and charge to operating expenses for depletion (columns 3 and 5, sheet 5) on the basis of a uniform annual amount arrived at by dividing the original investment of $900,000 by 40 years. This is an incorrect assumption, as explained under cases 1 and 2.

Case 4: In this case the property is classified as non-carrier, is to be depleted a uniform rate per year; and the entire carrying charges, including interest on investment, [fol. 369] are to be included in the cost of coal produced and thus charged to railway operating expenses.

The tabulated treatment under this classification and plan and the comments of the witness thereon are subject to the following criticisms which have been made in reference to previous cases discussed:

(a) As to remarks regarding the vicarious burden in earlier years;

(b) The use by the witness of assumed regular amounts as the investment in plant and development;

(c) The assumed uniform rate of mining.

Case 5: Under this case the property is classified as non-carrier, or if classified as carrier excluded from the rate base. The investment of $900,000 in mineral rights is amortized by an annuity equal to what an investment of $900,000 would buy for forty years at an assumed interest of 5 per cent, this annuity being charged to railway operating expenses during each of the forty years. This annuity amounts to either $52,450.38 or $52,246.80 per year, according to whether the interest is compounded on annual or semi-annual basis.

Such a plan is inconsistent with the proper theory of extinguishing of investment in minerals. An investment in minerals must be extinguished as and when the minerals are mined and not at a uniform rate per year regardless of rate [fol. 370] of extraction. Neither the rate of extraction nor the length of life of the property can be forecast with sufficient accuracy to permit the employment of such a scheme.

Case 6: In this case the property is classified as non-carrier, or if classified as carrier excluded from rate base. The compensation on the investment and the depletion are included in charge to railway operating expenses by basing

such charge on the current market prices of coal independently produced in the same region. The carrier would be engaged in the coal mining business just the same as any commercial operator and would be compensated, or fail to be compensated, for the investment in and the operation of the coal properties according to whether the cost of production was below or above current market prices of coal.

Such a scheme is contrary to the idea and plan of the railway company when it purchased the coal properties. The properties were purchased for the benefit of the carrier's transportation service. The transportation service and patrons affected thereby are entitled to all the benefits derived after giving due consideration for proper carrying charges or rate base allowance on the investment.

On the other hand, the railway service and affected patrons must run the risk of possible loss. In this respect the mining property is similar to any other property or equipment purchased by the carrier for the benefit of rail- [fol. 371] way service.

Witness says railway patrons under this plan would benefit indirectly in that carrier could exercise pressure to stabilize the market prices and would have greater assurance of steady fuel supply.

Obviously, the greater the pressure to decrease market prices the smaller would be the compensation to the carrier as return on its investment in the coal properties. In the case of Pond Creek and Vulcan collieries the railway patrons would benefit through the economies possible by direct deliveries of coal to coaling stations.

For these indirect benefits the railway company would receive no consideration in its return on the investment, or, as just stated, its return on the investment would be lessened thereby.

The witness is silent as to how the current market prices of coal independently produced in the same region would be determined. This determination, if injected into any plan, would be troublesome and argumentative.

Leaving now the discussion of the individual plans or cases and speaking of them in a general way, it is seen that in each of the cases presented and discussed by this witness, with the exception of case 6, the item mainly discussed and

subject to different schemes of accountng is the investment of $900,000 in mineral rights at Howard collieries.

[fol. 372] A uniform plan in all cases, whenever mentioned, is prescribed for the investment in plant, equipment and development of $900,000, the witness' figure for the investment in these items at Howard collieries as well as the investment in Pond Creek and Vulcan collieries.

Witness in his testimony is also silent as to the effective date of any of his proposed plans of accounting. To put any plan, except case 3 of carrier classification included in rate base, into effect would necessitate material changes not only in the mining accounts since acquisition of the properties, but would affect previous railway earnings and income.

[fol. 373] From my knowledge and experience with coal properties in general and with these coal properties in particular, I suggest as a practical and fair plan of accounting for the operation of this carrier's coal properties, if they are classified as transportation property and included in the rate base, the following: Before discussing such plans, I would like to make two general statements which I think are appropriate, First, the ownership and operation of the coal mines as a part of the transportation facilities of the carrier does not make necessary the employment or use of any accounting features for mine operation not in harmony with standard and appropriate accounting methods prescribed by usage and experience for coal mines and coal properties. The fact of ownership of the properties by the railway company does not change the properties and make them susceptible to different treatment in accounting matters, regarding operating costs and retirements of investment from that followed by good usage for other coal properties. Second, the accounting methods suitable for the practical and fair treatment of these properties as regards operation and investment are clear and comparatively simple and need not be made intricate.

We will now consider the plan of accounting.

The return on the carrier's investment in the coal properties would be commensurate with the income actually realized in net railway operating income, no direct carrying charge being included in the operating expenses of the mines. The fuel produced would be charged to railway

operating espenses at the cost of production, included in which cost would be appropriate items for depletion and depreciation.

The investment in the properties, carried in the appropriate railway capital account and included in rate base, would be the original investment, plus cost of additions and improvements to plant, property and equipment, minus retirements of like items, and minus the depletion and depreciation charges to current cost of production.

[fol. 374] The accounting details of mine operation should be kept in mine department books so that the final tonnage and cost figures could be entered monthly in the operating expense accounts of the carrier.

There seems to be no controversy over such direct operating costs as labor, supplies, power, insurance, taxes and royalty.

The only mine operating expense accounts which need any extended explanation are the charges to cost of coal for depletion and depreciation.

Depletion is the account set up to take care of the exhaustion of coal, the mining rights of which, or the coal itself, is owned or was purchased by the carrier.

There is only one practical and well established way to arrive at the proper charge for depletion and that is to estimate, as closely as it is practical so to do, the amount of recoverable coal and to divide this recover*al* tonnage into the total cost subject to depletion, thereby securing a figure*s* which represents the per ton charges to be made on each ton of coal when and as mined.

Any subsequent finding which makes it appropriate to alter the estimated recoverable tonnage should be recognized and the per ton depletion charge changed when and as necessary to meet changed conditions in the controlling factors.

As I have previously stated, there is no logical or recog-
[fol. 375] nized reason for increasing the residual investment in minerals or mining rights for interest on investment or for so-called carrying charge on coal properties under active development and in process of being depleted within a reasonable number of years, which conditions prevail at the properties under discussion.

Depreciation is loss in value of physical plant through use, time and for obsolescence and the charge for deprecia-

tion attempts to measure this loss in value. In the case of coal mines the depreciation of physical plant keeps step with the exhaustion of the coal, for, when the coal on the property, or that part of it which will be mined by the plant and equipment being depreciated, has been exhausted the plant and equipment will have little or no value.

The plan here advocated for the determination of the current depreciation charge is the recognized and practical one based on the exhaustion of the coal by arriving at a per ton charge which applied to the coal as mined will amortize the investment in plant and equipment less salvage value.

If the existing plant, or any part of it, cannot be utilized for the recovery of all the estimated tonnage, then consideration must be given in arriving at the per ton depreciation charge to the cost of additional plant items required for the recovery of the remaining estimated tonnage.

[fol. 376] The miscellaneous earnings or operating credits from stores, rental, commissions and such items, can either be used to reduce the cost of coal produced or can be credited to a suitable railway income account.

The plan herein recommended for determination of depletion and depreciation are recognized as competent and are prescribed by the Treasury Department under the United States Internal Revenue Act. This arm of the Federal Government has prescribed Rules and Regulations regarding these matters and they generally follow standard accounting matters.

I refer particularly to regulation No. 69 of the United States Internal Revenue Act.

The entire accounting system just outlined for the operation of the carrier's mines has been followed since the purchase of the mines by the carrier.

[fol. 377] Cross-examination:

The testimony I have just given was practically a reading from written notes supplemented by words as they came to me in response to the questions, and is, in its entirety a review of the testimony given in chief by the witness Field, and answers to other questions asked by counsel. Some of the notes from which I have testified were made before the cross-examination of Mr. Field. I heard

his cross-examination. In view of his explanation of the use of the $900,000.00 applicable to the Howard Colliery my comments and conclusions are the same as before just given to me. I cannot give the exact figure but the acreage of coal properties held by the Pocahontas Coal Company is in the neighborhood of two hundred thousand to three hundred thousand acres. I do not know what the cash investment in these properties is, nor do I know the percentage of stock in the Pocahontas Coal Company, which is owned by the Norfolk & Western. I am sure that practically all, if not all of the stock of this company is owned by the Norfolk & Western Railway Company, but I am not in a position to testify as to that. I know that the Pocahontas Coal Company is a subsidiary of the Norfolk & Western.

The employees engaged in coal mining operations are not at this time receiving, nor have they ever received, free transportation.

The witness Dunglinson, in answering the questions propounded by the Commission's witness Barnes, testified as follows:

I cannot say that the really important question in this case is the disposition of the carrying charge on the coal mines. As I understand it, the main object of the hearing is to properly classify investment in the mine properties. I cannot say that I am competent to answer as to whether or not the question involved in this hearing is primarily a question relating to accounting rules. I am familiar with [fol. 378] the order that was issued last year in regard to the accounting for coal mine properties of this carrier and it naturally follows that the rule was not satisfactory to the company or we would not have this hearing. I am also aware of the fact that the Petition to the Commission was to change those rules. I presume the two rules involved are the rules for the classification of the property and the rule for the accounting of the operation of the property. My testimony was in connection with the accounting for the operation of the mine property and the accounting for the investment in the mining property. It is my opinion that regardless of how the property is classified as between carrier and non-carrier the accounting for the operation of

the mines should continue practically the same as at present, except that if the property is non-carrier, I think that the production cost should be increased by a suitable carrying charge. If it is to be classified as transportation property, there is no necessity for such a charge. If the property were classified as transportation property, my recommendation was that the results of the operation, the cost of producing coal, depletion, royalty, and other similar charges, should be included in the accounts for railway operations practically as at present.

I do not indicate any change in classification nor recommend that the property should be classified as transportation property. I answered a question as to my idea of the accounting plan if the property were classified as carrier. It is my opinion that the mines should be classified as carrier property, but I do not want to get into any legal argument as to that.

If only the investment in the coal mining facilities were classified as carrier property and the investment in prepaid royalty were classified as no carrier, the cost of production would have to carry or would have to include the carrying charge on the prepaid royalty investment. I am not familiar with the practice of the Commission in de- [fol. 379] termining whether investment in property not actually in use shall be classified as non-carrier.

In answer to your question as to whether or not I find any justification in charging the public that is using the coal of today for the coal that will be used forty years from now, that is, the carrying charge upon that coal, I feel that the railroad is entitled to consideration for investment in the minerals currently and that it is entitled to consideration on the full investment and therefore, I feel that the railroad is justified in charging the public today, or whatever way you express it, the carrying charge as I have indicated in my testimony.

The following testimony is set out in the exact words of the witness in order that its exact meaning might appear:

Q. Is it your opinion, Mr. Dunglinson, that the public of today should bear the burden of the carrying charges on coal without regard to the quantity or the period in which it will be consumed?

A. The railroad has an investment in these minerals. The minerals are in active development. The minerals are not held for a reserve beyond a reasonable normal life of the coal properties. Therefore, whatever charge or burden or carrying charge, or whatever you wish to call it, that is justified by good accounting in a proper and practical way for the carrier for the operation of the mines, if that creates a burden, as you so term it, on the patrons of today, I think such a burden is justified.

Q. If the fair return upon the basis of 6 per cent would include the carrying charges on this coal of these mines if classified as carrier property, would not the same result be accomplished if the property be classified as non-carrier and a carrying charge of 6 per cent upon the net investment be included in the price of coal?

[fol. 380] A. The same result in what respect?

Q. So far as the returns upon the investment is concerned.

A. Yes, sir.

The witness further testified as follows:

I presume that Mr. Field's statement or view that the carrying charges on these collieries was a fair burden upon the patrons of the railroad is a fair statement. In my opinion, if the investment were not a prudent one, the situation as to whether the carrying charges are a proper burden upon the users of transportation would not be changed. In case the carrier were not able to produce its coal except for very much more than the prevailing market prices of coal, the public should, under the circumstances of the purpose of this purchase, bear the burden. In case the investment in the collieries were included in the rate base under an order of the Commission, and for any reason, the cost of mining became excessive, the rule for classification of the expenses would not protect the property from an excessive cost so far as I know. The plan of accounting suggested by me is practically the same plan now in effect and which has been in effect. In my opinion the property should be included in the investment in road and equipment.

Redirect examination—Dunglinson:

All of our coal properties are under active development at the present time and have been since acquisition. The

public of today is deriving the benefits of that development and operation. It would not have paid the Norfolk & Western to have purchased at each colliery a fraction of the coal lands it purchased and then develop them. It was highly desirable that the railway company purchase the coal properties in acreage and tonnage sufficiently large to give it a normal and reasonable life. The carrier would not have been justified in purchasing the equipment that it has purchased and in spending the money in the development if the acreage were substantially less at each of [fol. 381] these collieries. The acreages and tonnages must be of sufficient importance to justify the purchase of the equipment and other items of property.

In my opinion with my knowledge as a mining engineer and my experience in handling these properties the Norfolk & Western purchased wisely and economically in obtaining the acreage that it has at each of these collieries. I do not consider that the public of today is carrying any burden that it should not carry as the result of the ownership and operation of these mines. As a matter of fact, the public of today has derived substantial benefits from the purchase, ownership and operation of those mines and is receiving what I consider valuable aid through their ownership and operation. One reason for that is that they are getting the coal more cheaply than if they went into the open market. There are other benefits.

If the coal mining properties were put into the rate base the carrier would earn on that property whatever it made before it was subject to re-capture and one-half of the excess above 6 per cent if it were subject to re-capture. In that event, the earning would be more than a carrying charge of 6 per cent on the property.

I presume that the cost of operating power plants is charged to railway expenses irrespective of what that cost may be and regardless of whether or not it is produced at more or less than the power could be bought from a commercial company. The same thing would apply to shops where engines were produced and to carrier's freight system and to sand pits or any facility that a carrier operates in connection with its transportation service. The public takes the chance of the carrier doing it at a less price than the commercial price and also takes a chance on the carrier

doing it at a greater cost. In my opinion the public would not be endangered by excessive costs in carrier operated [fol. 382] coal mines any more than in any of these other facilities I have named.

Recross-examination:

I am acquainted with the proposition raised by the carrier in its Petition and to which his hearing is directed. I cannot answer as to whether under the plan proposed in the Petition now being considered that these coal mines would produce within themselves and independent of the rest of the railroad property a sufficient return to provide for a division of an excess above a return of 6 per cent. If the mines did not provide such a return, or, if they did not provide a return as great as 6 per cent and the entire rate base did provide a return of as much as 6 per cent, the earnings of the railroad system would have to supply the deficit existing in the coal mining proposition.

It might be theoretically right, or it might be theoretically deducted that if the investment that the carrier now has in these coal properties should be included in the rate base and a fair return is enjoyed thereon that that return would come, in some measure, from carrying charges upon coal not called into use for 30 or 35 years being paid from the beginning by the patrons of the road. I say it might be theoretically deduced because I think we have to look at it in a practical way. You have to have a sufficient investment in your property to justify a going concern. Naturally that makes it necessary that a carrying charge which you may possibly pin down to be a charge a little bit in the future to be borne by the earlier, but from a practical standpoint we have to consider it as a whole. And we are getting into a very deep discussion of theory that in practical usage and in practical operation of the mines is the secondary consideration. Theoretically and technically, as an [fol. 383] accounting proposition, the present day rate payers would be furnishing the carrying charge for coal not to be entirely used until the end of the mines producing-period.

Redirect examination:

As a matter of fact, the public today has no burden at all as a result of these mines but is reaping the advantage

because it is getting coal cheaper than it could buy it commercially as is indicated by the results and our records. So that as a practical proposition from a practical business-like view point, there is no burden on the public on account of the ownership and operation of the mines. As a matter of fact, where counsel for the commission used the word "burden", I think it should be changed to the word "advantage". The savings on the cost of coal produced are shown in Exhibit 5 and together with the other savings and benefits upon which I have previously testified constitute the savings affected by the operation of the mines. In the savings shown in Exhibit No. 5 no carrying charges are included in the cost of production and no return on any part of the investment in the coal properties. The public has had the benefit of the carrier not charging any return on the investment. No such charge ever having been made to the public. The coal has been furnished without any return to the carrier.

The foregoing constitutes a statement of all of the testimony introduced before the Interstate Commerce Commission.

Whereupon counsel for the Petitioner offered and there was received for the use of the Court a map designated "Norfolk & Western Railway Company Coal District & Mines June, 1930", which counsel for Petitioner here designate as "Coal District Map".

[fol. 384] Whereupon Counsel for the defendants, in order to maintain the issue on their part, offered and there was admitted in evidence the following:

1. As Defendants' Exhibit 1 (at trial) the following letter and enclosure therewith, to which was appended a Certificate by the Interstate Commerce Commission that said letter is a part of its records:

DEFENDANTS' EXHIBIT 1

"Norfolk & Western Railway Company, Accounting Department, Roanoke, Virginia

August 3, 1927.

"(Received by the Interstate Commerce Commission, Bureau of Accounts, August 4, 1927.)

"Mr. Alexander Wylie, Director Bureau of Accounts,
Interstate Commerce Commission, Washington, D. C.

DEAR SIR: I desire to submit for your consideration, the question of correct acounting for our investment in coal mining properties, the investment at the present time being carried in balance sheet account No. 705—Miscellaneous Physical Property, and represents an expenditure of $3,596,933.22, as follows:

Cost of Howard Collieries	$2,176,381.25
Cost of Vulcan Colliery	562,637.12
Cost of Pond Creek Colliery	857,914.85
Total	$3,596,933.22

"All of the coal mined from the three collieries is used exclusively by our road for transportation operations, and it has been our opinion for some time that the investment is more properly chargeable to Investment in Road and Equipment, No. 701.

[fol. 385] "This opinion is considerably strengthened by the exceptions taken to our plan of accounting for the net results of operating the commissary departments of the three mining properties, which we had treated as a credit to Income Account No. 511, Miscellaneous Non-Operating Physical Property. Exception No. 6 in letter dated May 31, 1927—D. C. 3908-R, covering examination of our accounts for the year ended December 31, 1921, to determine the Net Railway Operating Income, calls our attention to the improper accounting and directs that the receipts from the sale of merchandise be credited to Revenue Account No. 143 and the expenses of operating stores and cost of merchandise be charged to Expenses, No. 446, Other Miscellaneous Operations. Similar exceptions appear in report of examination of accounts of each subsequent year to 1925, inclusive.

"I wish to reaffirm statement made above, that all coal mined from the three collieries is used exclusively by our road for transportation operations and that no part thereof is sold commercially.

"I am enclosing herewith, copy of approved bill or entry prepared to transfer the investment from Account No. 705 to Account No. 701, and will appreciate advice that you concur and approve of the transfer.

"You will note that I have suggested Account No. 43, as the primary account in Classification of Investment in Road and Equipment to which charge should be made.

"Yours truly, W. H. Wilson, Comptroller.

"Cy. A. C. N., W. S. B., T. W. R., E. H. A.

Enclosure.

August 4, 1927.
436,550.

(The said enclosure is as follows:)

[fol. 386] Copy.

Norfolk & Western Railway Co. to Miscellaneous Physical Property ₵705

Date 1927		
July 27.	To transfer from Miscellaneous Physical Property ₵705 to Investment in Road and Equipment ₵701, the original cost of and expenditures for additions and betterments to the three coal mines, i. e. Howard Collieries, Vulcan Colliery and Pond Creek Colliery, the mines being operated exclusively for the purpose of producing fuel used by Railroad Company in transportation operations, see detail below.....	$3,596,933.22

	Howard collieries	Vulcan colliery	Pond Creek colliery	Total
Original Cost.....	$1,486,308.72	$389,588.01	$332,032.07	$2,207,928.80
Expenditures for Additions & Betterments	690,072.53	173,049.11	525,882.78	1,389,004.42
	$2,176,381.25	$562,637.12	$857,914.85	$3,596,933.22

Charge: (Investment in Road and Equipment ₵701.) (Road and Equipment ₵43.)

—— ——, Comptroller.

[fol. 387] Which said letter the defendant stated and contended should be treated as the initial pleading in this proceeding. The Petitioner objected to the introduction of the said letter on the ground that the same was no part of the record in the proceedings had before the Interstate Commerce Commission, although said letter may have been unofficially filed with the correspondence with said Commission.

The court overruled the objection of the Petitioner to the introduction of said letter, to which action of the court

in overruling its objection, Petitioner by counsel then and there excepted.

2. As Defendants' Exhibit 2 (at trial) Ex-Parte Order of Interstate Commerce Commission "In the Matter of the Uniform System of Accounts Kept By Steam Railroads", which said Order counsel for the Defendants stated was entered without a hearing pursuant to the request contained in the foregoing letter introduced as Exhibit 1 at hearing.

3. As Defendants' Exhibit 3 (at trial) copy of letter certified by the Secretary of the Interstate Commerce Commission from the Commission's Bureau of Accounts addressed to the Comptroller of the Norfolk & Western Railway Company, referring to the said letter of August 3rd, 1927, which was introduced as Exhibit No. 1 at hearing.

To the introduction of which said letter, counsel for petitioner then and there objected on the grounds that the same was irrelevant, immaterial and incompetent, and was not a part of the record in these proceedings before the Commission. The court, however, overruled the objection of counsel for the Petitioner, to which action of the court in so ruling, counsel for Petitioner then and there excepted.

4. As Defendants' Exhibit 4 (at trial), copy of Norfolk & Western Railway Company's Motion for a rehearing and reconsideration.

[fol. 388] 5. As defendants' Exhibit 5 (at trial), certified copy of a supplemental order of the Interstate Commerce Commission, in which the Commission set aside its Ex-Parte Order already introduced and set the matter for hearing and for the taking of evidence, which resulted in the taking of the evidence appearing in the foregoing statement.

6. As Defendants' Exhibit 6 (at trial), certified copy of pamphlet containing Interstate Commerce Commission's Classifications of Accounts and Instructions for the making up of such classifications. Another copy of which said pamphlet was likewise attached to the Answer of the Commission filed in this cause.

7. As Defendants' Exhibit 7 (at trial), copy of the Interstate Commerce Commission's Rules of Practice, approved

December 2, 1929, together with an additional order or ruling specifically applicable to recapture proceedings.

To the introduceion of which said Exhibit, the Petitioner, by counsel, objected on the grounds that the same was irrelevant, but the court overruled said objection and counsel for the Petitioner then and there excepted.

8. As Defendants' Exhibit 8 (at trial), certified copy of tentative recapture report issued by the Interstate Commerce Commission pursuant to the recapture rule in advance docket No. 3865, and attached thereto a printed copy of the protest of the Norfolk & Western Railway Company to the tentative recapture report; the protest being made pursuant to the recapture rule.

No further evidence was offered by either party and, after the court had heard argument by counsel representing the petitioner and defendants' counsel for both the Petitioner and defendants announced that the cause was submitted to the court for final decision.

[fol. 389] DEFENDANTS' EXHIBIT No. 3

Interstate Commerce Commission, Bureau of Accounts, Washington

January 20, 1928.

Mr. W. H. Wilson, Comptroller Norfolk & Western Railway Co., Roanoke, Virginia.

DEAR SIR: Referring to your letter of August 3, 1927, concerning the question of accounting for your company's investment in and the operation of coal mining properties.

This matter has been given very careful consideration by the Commission and I am handing you next attached copies of an order of the Commission establishing the rules of accounting for these properties.

I would suggest that you prepare forms of entries and of operating statements which will tentatively indicate your understanding of the accounting requirements of this order. When these are prepared, I will be glad to go over them with you or your representative in my office, in order

that there may be no doubt with respect to the provisions of this order being met.

Yours very truly, (Signed) Alexander Wylie, Director.

[fol. 390] DEFENDANTS' EXHIBIT No. 4

BEFORE THE INTERSTATE COMMERCE COMMISSION

In the Matter of Uniform System of Accounts to be Kept by Steam Railroads

The Norfolk & Western Railway Company, a common carrier subject to the provisions of the Interstate Commerce Act, respectfuly petitions the Commission to reopen and reconsider matters dealt with in its order of January 14, 1928, in the above mentioned matter, to grant a hearing and argument with regard to the propriety of the requirements of that order, and to modify or vacate that order.

In support of its petition the Norfolk & Western Railway Company respectfully shows:

I

On January 14, 1928, the Commission, by Division 4, entered its order in this proceeding as follows:

"The matter of the classification of investment in collieries and the accounting for the operation thereof by the Norfolk and Western Railway Company being under consideration,

It is Ordered, That the carrier's investment in the Howard, Vulcan and Pond Creek Collieries shall be classified as investment in noncarrier property and included in balance sheet account 705, "Miscellaneous physical property". That annually there shall be added to the cost of these properties, and included in this account, interest upon the residual investment reckoned at fair interest rates, but not in excess of the rate of 6 per cent per annum, the amounts thus charged to be concurrently credited to account 515, "Income from unfunded securities and accounts."

It is Further Ordered, That a separate clearing account shall be kept for the operation of each colliery to include

the detailed cost of operation and that the monthly charge for depletion shall be upon the basis of such rates per ton, as will as nearly as practical, extinguish the investment in the property (less salvage) during the period in which the coal owned by the carrier is mined.

It is Further Ordered, That the charges to operating expenses for the coal produced in these collieries which is used in the carrier operations of the railway shall be upon the basis of the average monthly cost per ton for producing the coal each month."

[fol. 391] II

The order in question requires an incorrect classification of the carrier's property. The fuel mines in question are owned by the petitioner. They are all located on petitioner's line of railroad, that is, they have either direct track connection with those rails or the coal from the mines is brought to those rails by means of an aerial. Those mines are operated by employees of the petitioner, and the coal produced is used exclusively by the petitioner in its common carrier operations. No part of the output of those mines is sold to any other person, and the petitioner is without corporate authority to produce coal for any purpose other than for its own use in its common carrier activities. Under these circumstances, it is respectfully submitted, the *the* fuel mines in question are carrier properties, and should be so classified.

Accordingly, the Norfolk and Western Railway Company respectfully petitions the Commission to reopen and reconsider the merits dealt with in that order, to grant a hearing and argument with regard to the propriety of the requirements of that order, and to modify or vacate the said order.

Norfolk and Western Railway Company, by (Sgd.)
A. C. Needles, President.

Feb. 28, 1928.

State of Pennsylvania,
County of Philadelphia, ss:

A. C. Needles makes oath and says that he is the President of Norfolk and Western Railway Company; that he has knowledge of the matters and things set forth in the foregoing petition; to the best of his knowledge and belief

the matters and things therein contained are true, as he verily believes.

(Sgd.) A. C. Needles.

Subscribed and sworn to before me, a Notary Public in and for the State and county above named, this 28th day of February, 1928. My commission expires March 12, 1929. William E. Stokes, Notary Public. (Seal.)

Theodore W. Reath, 1201 Commercial Trust Bldg., Philadelphia, Pa.; D. Lynch Younger, 814 Transportation Bldg., Washington, D. C., Counsel for Petitioner.

[fols. 392-646] DEFENDANTS' EXHIBIT No. 5

INTERSTATE COMMERCE COMMISSION

At a Session of the Interstate Commerce Commission, Division 4, Held at Its Office, in Washington, D. C., on the 24th Day of July, 1928

In the Matter of a Uniform System of Accounts to be Kept by Steam Railroads

Supplemental Order

The Commission having under consideration the matter of the classification of investments in collieries and the accounting for the operation thereof by the Norfolk & Western Railway Company; and

It appearing that on January 14, 1928, the commission, by division 4, entered its order in the above entitled proceeding, requiring that the carrier's investment in the Howard, Vulcan and Pond Creek Collieries be classified as investment in non-carrier property and included in balance sheet account 705, "Miscellaneous Physical Property", prescribing certain methods of accounting for the cost and depletion of the investment of the carrier therein, and the recording in the operating expense accounts of the carrier of the cost to it of coal therefrom mined for railroad use; and

It appearing that the said company, on February 28, 1928, petitioned the commission to reopen and reconsider the matters dealt with in said order, and to grant a hearing and argument with regard to the propriety of the requirements thereof,

It is ordered that the date upon which said Order entered herein, as aforesaid, shall become effective, be and it is hereby indefinitely postponed;

It is further ordered that the matters dealt with in said order dated January 14, 1928, be, and they are hereby, assigned for hearing for the purpose of receiving evidence and for argument, at a date and place hereafter to be fixed.

It is further ordered that this order be served upon the said Norfolk and Western Railway Company and that notice of said hearing be given to the general public by posting a copy of this order with the Secretary of the Commission at Washington, D. C.

By the Commission, Division 4.

George B. McGinty, Secretary. (Seal.)

[fol. 647] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE, VIRGINIA

In Equity. No. 823

NORFOLK AND WESTERN RAILWAY COMPANY, Petitioner,

versus

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

FINAL DECREE—Oct. 15, 1931

This cause coming on to be heard before the undersigned, constituting a special court of three judges convened according to statute to pass upon an application for an injunction to restrain the enforcement of an order of the Interstate Commerce Commission, and being heard upon the bill and answers and the evidence introduced before the Commission, and the cause having been submitted as upon final hearing:

The Court finds the facts to be as set forth in the report of the Commission, copy of which is attached to the bill; and the Court being of opinion, for the reasons set forth in the written opinion filed herewith, that complainant is not entitled to an injunction and that the bill is lacking in equity; it is ordered that the application for an injunction be denied and that the bill be dismissed at the cost of complainant.

This the 15th day of October, 1931.

John J. Parker, United States Circuit Judge, Fourth Circuit. Henry C. McDowell, United States District Judge, Western District of Virginia. Luther [fol. 648] B. Way, United States District Judge, Eastern District of Virginia.

[fol. 649] In United States District Court for the Western District of Virginia

Norfolk and Western Railway Company, Petitioner,

versus

United States of America and Interstate Commerce Commission, Defendants

On Petition for Injunction

(Argued July 20, 1931. Decided —— —, ——)

Before Parker, Circuit Judge, and McDowell and Way, District Judges

S. King Funkhouser, D. Lynch Younger, and Theodore W. Reath (Funkhouser, Apperson & Whittle on brief) for Petitioner;

Elmer B. Collins, Special Assistant to the Attorney General; John Lord O'Brian, Assistant to the Attorney General, and John Paul, United States Attorney, for United States of America, and Nelson Thomas and Daniel W. Knowlton (Nelson Thomas on brief) for Interstate Commerce Commission.

OPINION—Filed October 15, 1931

[fol. 650] PARKER, Circuit Judge:

This is a suit, instituted by the Norfolk & Western Railway Company against the United States and the Interstate Commerce Commission, to enjoin the enforcement of an accounting order of the Commission which directs the railway company to include its investment in certain coal mines under balance sheet account 705, which embraces miscellaneous or non-transportation property. The company alleges that these mines are operated in connection with its system of transportation and produce 48% of its total fuel requirements; that it is entitled to have the investment therein included with transportation property under balance sheet account 701, which embraces investment in road and equipment; and that the Commission's order classifying same as non-transportation property is without warrant or authority of law, exceeds the power of the Commission, is unsupported by the evidence and is an arbitrary abuse of power on the part of the Commission. It prays for an injunction restraining the enforcement of the order and asks that same be set aside and annulled. A special court of three judges has been convened pursuant to statute, and the case has been submitted as upon final hearing.

There is practically no dispute about the facts; and although the entire record before the Commission has been put in evidence and examined by us, the comparatively brief statement in its report sets forth all of the facts which bear upon the Questions involved. These facts may be summarized as follows: Complainant is a common carrier by railroad engaged in interstate commerce. It owns three large collieries in West Virginia, which were purchased for the purpose of furnishing a part of the coal supply which it requires. Two of these were purchased in 1917 and one in 1920. The total estimated tonnage of all the properties at the time of purchase, including leases subsequently acquired, was 53,103,000 tons. The total of the coal mined up to September 30, 1928, was 8,476,058 tons. The estimate as to the period which will be required for the exhaustion of the coal in the various collieries under normal condi-
[fol. 651] tions of production, reckoned from the year 1928, is 17 years, 33 years and 35 years respectively. The fuel

requirements of complainant are about 3,250,000 tons of coal per annum; and, from the collieries in question, approximately 48 per cent of this requirement is obtained. Their entire output, except for small amounts of coal furnished to mine employees, is consumed in carrier operations.

The investment of complainant in these coal properties, including the purchase cost of the original properties, the cost of subsequently acquired leaseholds, and the cost of additions and betterments, was $3,661,036.63 as of September 30, 1928. The debits for depreciation and depletion as of the same date were $1,010,569.35, leaving a net capital investment as of that date of $2,650,467.28. Since the opening transaction, the investment has been carried by complainant in balance sheet account 705, which covers investments in physical property other than transportation property.

On August 3, 1927, complainant addressed a letter to the Commission requesting that it be allowed to transfer the investment from account 705 to account 701, which covers investment in road and equipment. In response to this the Commission on January 14, 1928 entered an ex parte order directing that the investment be carried under account 705. Complainant thereupon petitioned for a rehearing, and a supplemental order was entered postponing the effective date of the original order and setting the matter down for hearing and argument. Extensive hearings were then held; and, on January 5, 1931, the Commission entered the order which we are asked to enjoin, directing that the investment be carried under account 705 and providing among other things that the charges to account 716, "Material and supplies", for coal produced for consumption in complainant's transportation operations be upon the basis of the average monthly cost per ton of producing the coal.

It appears that the Commission has made and reported its final valuation of complainant's properties under section 19(a) of the Transportation Act, valuing them as of June 30, 1916. (Norfolk & Western Railway Company 26 val. rep. 255.) As the collieries were acquired subsequently to 1916, they are not included in that report. On February 6, 1931, the Commission made and published its recapture [fol. 652] report under section 15(a) of the Transportation

Act, setting forth therein the value of complainant's property for rate making purposes, the net railway operating income, the excess net operating income and the excess income recapturable, and directing complainant to pay over to the Commission the recapturable amounts so found. Complainant filed protest and objections to this report; and the questions raised thereby are now in process of determination before the Commission. In the report of the Commission the collieries of complainant are classified as non-carrier property and are not included as an element in determining the rate base; and one of the objections to the report is that they have not been so included. The question as to whether they should be included is thus pending before the Commission in that proceeding.

Complainant contends that its collieries are a part of its property devoted to transportation and that it is entitled to have them included in any valuation of its transportation property which is to be used as a base for rate making or recapture purposes; that the accounting required by the Commission is used as a basis for arriving at the valuation adopted for these purposes; and that the order requiring it to classify its collieries as non-transportation property will result in its being deprived of the benefit of their value in the case fixed for rate making and for the recapture of excess income. The defendants deny the jurisdiction of the court to grant an injunction, contending that the order is purely negative, being a mere denial of a request to change the method of bookkeeping, that, if considered without relation to rate making and recapture proceedings, it imposes no burden or hardship upon complainant, and that, if considered with relation to such proceedings, it is a mere step in the proceedings which the courts will not enjoin. On the merits, they say that the statute vests the Commission with discretion in prescribing how accounts shall be kept by carriers; that an order made in the exer- [fol. 653] cise of this discretion will not be enjoined in the absence of abuse; and that a direction that collieries such as those here involved be classified as non-transportation property, is not an abuse of discretion but a fair and reasonable exercise thereof.

On the question of jurisdiction, it is clear that the order involved is not a mere negative order. It commands com-

plainant to keep its accounts and make its reports in a certain definite way; and disobedience of the order would unquestionable subject complainant to the penalties prescribed by statute for the disobedience of an order of the Commission. Nor is it a mere step in a rate making or recapture proceeding. On the contrary, it was entered pursuant to a statutory provision which existed before the enactment of the sections which authorize such proceedings. While it is true that the duty rests upon the Commission, in prescribing the form of accounts which shall be kept by carriers and the reports which shall be made to it, to require that same disclose the information necessary to enable it to perform its duties under sections 19(a) and 15(a) of the Transportation Act, we do not understand that any orders which the Commission may make relative to accounting, or any reports which may be made to it in compliance with such orders, are binding as to the classification of property in any rate making or recapture proceedings which may arise. Notwithstanding accounting orders and reports made pursuant thereto, it is open to a carrier in any rate making or recapture proceeding to contest what it regards as an improper classification of its property in arriving at the rate base.

But while we do not think that an accounting order such as this can be treated either as a binding classification of property in a rate making or recapture proceeding or as a step in such proceedings, we cannot say that it imposes no burden or hardship furnishing ground for injunctive relief, if in fact it transcends the power of the Commission or is so manifestly arbitrary and unreasonable as to evidence an abuse of discretion. Accounting under the order of the Commission is not a mere matter of form but one of substance. It sets forth the condition of public carriers [fol. 654] for the information of their stock and bond holders and the investing public as well as for that of the Commission. It furnishes the basis of corporate financing and many other matters affecting their very existence. They are entitled, therefore, not to be subjected to accounting orders which transcend the powers of the Commission or which are arbitrary or unreasonable; and we have no doubt that, as against an accounting order which so offends, a carrier is entitled to relief by injunction. There is jurisdiction in equity therefore, to entertain the suit which has

been instituted. See Kansas City Sou. R. Co. v. U. S. 231 U. S. 423; Atlanta B. & C. R. Co. v. U. S. 28 Fed. (2) 885.

But although the court, for the reasons stated, has jurisdiction to entertain the suit of complainant, we do not think that complainant is entitled to the relief prayed. The Commission is vested by Congress with full power and authority to require reports from carriers and to prescribe the form of the accounts which they shall keep. See Interstate Commerce Act as amended, section 20 paragraphs 1 and 5. 49 U. S. C. A. 20 (1) and (5). The purpose of vesting this power in the Commission is that it may be able, by obtaining accurate information as to the business of the carriers, to perform properly the duties, such as the regulation of rates, imposed upon it by Congress. Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194. It is manifest that, without a uniform system of accounts for all carriers, it would be impossible for it to perform these duties intelligently; and so, in addition to the power to require reports, it is given the power to prescribe the forms in which the accounts of carriers shall be kept. What these forms shall be, and what items shall be allocated under particular subdivisions thereof, are obviously matters which must rest in the discretion of the Commission; and the courts will not interfere with the exercise of that discretion unless such exercise is so manifestly arbitrary and unreasonable as to transcend the Commission's powers. Kansas City Sou. Ry. v. U. S. 231 U. S. 423.

[fol. 655] The Commission has for years required that coal mines be included under balance sheet account 705. The order of May 19, 1914 prescribed the classification, section 705 thereof being as follows:

"705. Miscellaneous Physical Property.—This account shall include the accounting company's investments in physical property other than transportation property assignable to accounts Nos. 701 and 702, including hotels, restaurants, commercial power plants, etc., which are entirely distinct from transportation property and are not operated in connection with the transportation service of the accounting company.

"Items of Investment

"Coal and other mines, commercial power plants, hotels and restaurants, lands and buildings not used in transporta-

tion operations, lands and other property acquired and held in anticipation of future use, mineral and timber lands, rails and other track materials leased to others, sawmills and other manufacturing plants not operated in connection with transportation service."

We cannot say that the inclusion within this classification of coal mines from which carriers obtain coal for use in transportation is arbitrary or unreasonable. On the contrary, it seems to us to be entirely reasonable and proper. Coal mining is a business entirely separate and distinct from the business of transportation; and the fact that the product of the mines is used in transportation does not mean that the mines themselves are so used. It has been expressly held that the mining of coal is not commerce even though the coal when mined is to be used or transported in commerce. D. L. & W. R. Co. v. Yurkonis 238 U. S. 439; United Mine Workers v. Coronado Coal Co. 259 U. S. 344, 407; Oliver Iron Mining Co. v. Lord 262 U. S. 172. And it follows that coal mining is not transportation; for all transportation in the sense in which we are using the term here is commerce, although not all commerce is transportation.

Nor can the mining of coal to be used in transportation be said to be so closely related to that business that the mines may properly be treated as transportation equipment. The mining is an independent though subsidiary business, only the product of which is used in transportation. Car- [fol. 656] riers have need of many things,—coal, iron, steel, timber, etc. Some of them may find it expedient to go into the business of manufacturing these commodities for their own use; but, when they do so, it is clear that they are engaging in a business which is separate and distinct from the business of transportation itself. Property employed in transportation is dedicated to the use of the public: property employed in such a subsidiary business is not so dedicated. The public may regulate the rate to be exacted in the operation of property dedicated to the public use: it has no such right with respect to other property. It is important, therefore, in the valuation of property owned by carriers to distinguish between property dedicated to the use of the public and property invested in a business which is not so dedicated, as it is the value of the former

which must furnish the basis of rate making and recapture proceedings.

Coal mines, even though owned and operated by a carrier, are clearly not dedicated to the use of the public. See Wolff Packing Co. v. Court of Industrial Relations 262 U. S. 522. Although the coal produced by operation of the mines may be said to be used by the public, the mines themselves are not so used. What is used, and all that is used, in the public business of transportation is the coal which prior to its use has been made available by the independent business of mining. The mines of a carrier, therefore, are not dedicated to a public use any more than are mines owned by a private corporation which supplies coal to a carrier under contract. They stand upon the same basis with respect to the public service as do plants for manufacturing cars or locomotives. A railroad may not abandon service on its railroad lines and may not lease or sell them without the consent of the Commission because of the rights of the public therein; but no one would contend that the carrier here might not at its pleasure discontinue the operation of its coal mines or lease or sell them as it might see fit.

It is argued that the acquisition of the coal mines should be regarded as the acquisition of a fuel supply for the carrier; but even if so regarded, it is clear that a carrier may not have a fuel supply sufficient to last it for thirty-five years valued as property used in transportation for the purpose [fol. 657] of fixing rates to be paid by the public. If it desires to speculate in the purchase of the fuel supply, it must do so at its own risk and not at the risk of the public. But as a matter of fact, the acquisition of mines, as indicated above, is essentially different from the acquisition of coal. Their acquisition results in coal for the use of the carrier only after the independent business of mining has first been carried on. While coal which has been mined may be used by the *the* carrier, coal in the mine is the basis not of transportation but of mining.

We have been referred to border line cases, involving the operation of power plants, gas plants, and plants for supplying water, in which the property so used has been classified by the Commission as transportation property. There seems to be a difference however, between these operations and coal mining, in that the product which they supply is used so directly and immediately in the service of transpor-

tation that it may properly be said that the property engaged therein is itself used by the public. No one, however, would say that the public is using the coal mines of this carrier merely because the carrier is using the coal obtained from the mines. But it is for the Commission and not for the courts to classify the property of the carriers and to prescribe the accounts which they shall keep; and it is clear that its classifications may properly rest upon the customs and practices of carriers rather than upon logical formulas or analytical reasoning with reference to use. The fact that most railroads own no coal mines, that the Commission for years has followed the policy of classifying such mines as non-transportation property, and that all roads, even complainant itself, have followed the classification, is sufficient reason for continuing it. Unless the classifications prescribed are such that transportation property means practically the same thing with reference to the property of any carrier to which the classification may be applied, the reports to the Commission will have little value and it will be without the information necessary to enable it to perform the important duties required of it by Congress. Even if [fol. 658] we thought, therefore, that the mines here in question ought logically to be classified under transportation property, "we still should not deem this a sufficient ground to declare that the Commission had abused its power. So long as it acts fairly and reasonably within the grant of power constitutionally conferred by Congress, its orders are not open to judicial review." Kansas City Sou. Ry. v. U. S., supra, 231 U. S. 423, 456.

Complaint is made of the order in question upon the further ground that it requires that charges for the coal produced in the collieries shall be upon the average monthly cost of production. We do not understand from this, however, that the carrier is confined to the mere cost of mining the coal, or is precluded from including in the monthly cost such items as are fairly chargeable to the cost of the coal on account of depletion, depreciation, carrying charges and a fair return upon the investment. Complainant is required to submit within thirty days after the close of each month a statement showing the cost of coal as computed by it together with the prices paid by it for coal purchased; and, if upon such reports the commission disallows proper charges on account of the coal obtained from its mines, complainant may obtain relief in a suit instituted for that purpose.

These is nothing in the record before us which would justify the granting of such relief here.

For the reasons stated, the injunction will be denied and the bill will be dismissed at the cost of complainant.

Bill Dismissed.

I concur.

(Signed) Henry C. McDowell, District Judge.

I concur in this opinion.

(Signed) Luther B. Way, U. S. D. J.

Oct. 6, 1931.

[fol. 659] In United States District Court

[Title omitted]

Petition for Appeal—Filed November 14, 1931

To the Honorable the District Court of the United States for the Western District of Virginia:

Your petitioner, Norfolk & Western Railway Company, a Corporation, being aggrieved by the final order or decree of the District Court of the United States for the Western District of Virginia made and entered on the 15th day of October, 1931, hereby appeals from said order or decree to the Supreme Court of the United States of America for the reasons specified in the Assignments of Error filed herewith, and petitioner prays that this appeal may be allowed; that citation be issued as provided by law, and that a transcript of the records, proceedings and documents upon which said decree was based, duly authenticated, be transferred to the Supreme Court of the United States under the Rules of said Court in such cases made and provided.

Your Petitioner further prays that proper order be entered relating to the security to be required of it.

At Roanoke, Virginia, the 14th day of November, 1931.

Theodore W. Reath, D. Lynch Younger, S. K. Funkhouser, Harvey B. Apperson, Solicitors for Norfolk & Western Railway Company, a Corp., Petitioner.

Theodore W. Reath, D. Lynch Younger, S. K. Funkhouser, Harvey B. Apperson, Solicitors for Norfolk & Western Railway Company, a Corporation, Petitioner.

[fol. 660] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 14, 1931

Comes now the Petitioner in the above entitled cause and presents its Assignment of Errors and says that in the record and proceedings in the above-entitled cause and the decree (hereinafter referred to as "the decree") made and entered against it herein on the 15th day of October, 1931, there is error in the particulars hereinafter set forth, that is to say:

I

The Court erred in holding that the petition is lacking in equity and that petitioner is not entitled to the relief prayed for, and erred in dismissing the petition and refusing to grant Petitioner the relief prayed for.

II

The Court erred in making the decree and dismissing the petition, in sustaining the action of the Commission, and in refusing to enjoin, set aside and annul the action of the Commission in classifying Petitioner's collieries as non-transportation property and requiring the investment in those collieries to be included in Account Number 705 (non-carrier property) instead of Account Number 701 (carrier property). The Court should have held said collieries to be property held for and used in the service of [fol. 661] transportation and carrier property, and should have restrained the Commission from classifying them otherwise.

III

The Court erred in making the decree and dismissing the bill, in sustaining the action of the Commission, and in refusing to grant the relief prayed for in the petition, because the decision and order of the Commission classifying Petitioner's collieries as non-transportation properties was unsupported by substantial evidence, and the order was, therefore, unlawful, unreasonable, arbitrary and void in violation of the due process limitation of the Fifth Amendment of the Constitution of the United States.

IV

The Court erred in making the decree and dismissing the petition, in sustaining the action of the Commission, and in refusing to grant the relief sought by the Petition, because the action of the Commission in classifying Petitioner's collieries as non-carrier or non-transportation properties was contrary to the uncontradicted evidence which showed that the collieries were acquired by petitioner solely for the purpose of providing a part of the fuel used in its carrier operations, that the use of the collieries is limited to that purpose, and that the properties are held for and used in the service of transportation, and the Commission's action was therefore unlawful, unreasonable, arbitrary and void in violation of the due process limitation of the Fifth Amendment of the Constitution of the United States.

V

The Court erred in making the decree and dismissing the petition, in sustaining the action of the Commission and in refusing to grant the relief prayed for in the petition, be- [fol. 662] cause the action of the Court and the action of the Commission was based upon an erroneous conception and theory of the law in the following respects, viz:

(a) In holding that the classification of Petitioner's collieries as non-carrier or non-transportation properties was within the exercise by the Commission of the discretion vested in it by the Interstate Commerce Act (Section 20, Paragraphs 1 and 5), whereas the law requires that the Commission must exercise its powers "fairly and reasonably within the grant of power constitutionally conferred by Congress," and the action of the Commission complained of was unsupported by evidence, contrary to the evidence, unreasonable, arbitrary and void in violation of the due process limitation of the Fifth Amendment of the Constitution of the United States.

(b) In holding that Petitioner's collieries are non-carrier or non-transportation properties because:

"Coal mining is a business entirely separate and distinct from the business of transportation; and the fact that the product of the mines is used in transportation does not

mean that the mines themselves are so used. It has been expressly held that the mining of coal is not commerce even though the coal when mined is to be used or transported in commerce. * * * And it follows that coal mining is not transportation; for all transportation in the sense in which we are using the term here is commerce, although not all commerce is transportation.

"Nor can the mining of coal to be used in transportation be said to be so closely related to that business that the mines may properly be treated as transportation equipment. The mining is an independent though subsidiary business, only the produce of which is used in transportation."

(c) In holding that carriers may go into the business of manufacturing various commodities for their own use in transportation, but when they do so they engage "in a business which is separate and distinct from the business of transportation itself"; whereas carriers may and do engage in such manufacturing and when the facilities are [fol. 663] owned by a carrier and their use is confined to the production of commodities or supplies for the performance of the transportation service the facilities are property "held for and used in the service of transportation."

(d) In holding that property employed in transportation is dedicated to public use, that the petitioner's collieries are not dedicated to the use of the public, and that therefore those collieries are not transportation or carrier property; whereas the said collieries are dedicated to the public use in the production of fuel to enable the carrier to conduct its transportation operations.

(e) In holding that the petitioner's collieries are non-carrier or non-transportation properties because "they stand upon the same basis with respect to the public service as do plants for manufacturing cars or locomotives"; whereas such plants owned by carriers, are property held for and used in the service of transportation and are so classified by the Commission.

(f) In holding that the collieries in question are non-carrier or non-transportation property because they may be sold or leased by the carrier although "a railroad may

not abandon service on its railroad lines and may not lease or sell them without the consent of the Commission"; whereas the test of right of the carrier to abandon, lease or sell is unrelated to the question whether the properties are carrier or non-carrier, transportation or non-transportation properties, because the limitations upon the right to abandon, lease or sell apply only to the "line of railroad" and service over such line and do not apply to other facilties which are transportation or carrier properties, such as cars, locomotives, depots, etc.

[fol. 664] (g) In holding that Petitioner's collieries are different from other kinds of property, not directly engaged in the movement of freight or passengers, but producing commodities used in and necessary for the conduct of the transportation service, such as power plants, gas plants, water plants, which are classified by the Commission as property held for and used in the service of transportation.

(h) In holding that the classification of Petitioner's collieries "may properly rest upon the customs and practices of carriers rather than upon logical formulas or analytical reasoning with reference to use".

(i) In holding that the classification of Petitioner's collieries as property not used in the service of transportation is justified by the fact that most railroads have no coal mines, the Commission has in the past classified such mines as non-carrier properties, and all railroads including petitioner have followed that classification.

(j) In holding that "all transportation in the sense in which we are using the term here is commerce", although the transportation includes all facilities held for and used in the service of transportation, many of which are not commerce.

(k) In holding that even if the collieries "ought logically to be classified under transportation property" nevertheless the classification out of property held for and used in the service of transportation would be fair and reasonable.

VI

The Court erred in making the decree and dismissing the petition, in sustaining the order of the Commission, and

in refusing to grant the relief prayed for in the petition, [fol. 665] because the report and order of the Commission complained of were based solely upon the requirement of uniformity of property accounted for by all carriers instead of uniformity of accounts, and the Court erred as a matter of law in the same way in holding that "unless the classifications prescribed are such that transportation property means practically the same thing with reference to the property of any carrier to which the classification may be applied, the reports to the Commission will have little value and it will be without the information necessary to enable it to perform the important duties required of it by Congress", and so erred in confusing an uniform accounting system with uniformity of property by every carrier accounting under the system.

VII

The Court erred in making the decree and dismissing the petition, in sustaining the action of the Commission, and in refusing to grant the relief prayed for, because the order of the Commission constitutes an invasion upon the managerial discretion which Petitioner is entitled under the law of the land, Amendment V of the Constitution of the United States, to exercise as to its property.

VIII

The Court erred in making the decree and dismissing the petition, in sustaining the action of the Commission, and in refusing to grant the relief prayed for in the petition, because the action of the Commission complained of constitutes a taking of Petitioner's property without just compensation in violation of the Fifth Amendment of the Constitution of the United States, and a taking of the legal right of the Petitioner to have and use fair and reasonable accounting for its property.

Wherefore Petitioner prays that said decree entered herein on the 15th day of October, 1931, be reversed with [fol. 666] directions that the injunction be issued in accordance with the prayer of said petition and that there

be granted such other, further and general relief as may be appropriate.

(Signed) Theodore W. Reath, (Signed) D. Lynch Younger, (Signed) S. K. Funkhouser, (Signed) Harvey B. Apperson, Solicitors for Norfolk & Western Railway Company, a Corporation, Petitioner.

Theodore W. Reath, D. Lynch Younger, S. K. Funkhouser, Harvey B. Apperson.

[fol. 667] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—NOV. 18, 1931

The Petitioner in the above-entitled suit, having prayed for the allowance of an appeal in the above-entitled case to the Supreme Court of the United States from the decree made and entered in the above-entitled suit by the above-entitled Court on the 15th day of October, 1931, and from each and every part thereof, and having presented and filed its Assignment of Errors pursuant to the statutes and rules of the said Court in such case made and provided;

It is hereby ordered that said appeal be and it is granted; that citation be issued as provided by law and that a transcript of the records, proceedings and papers upon which said decree was based, duly authenticated, be transferred to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

And it is further ordered that security for costs on appeal be fixed in the sum of $1,000.00.

Dated November 18, 1931.

John J. Parker, United States Circuit Judge, Fourth Circuit. Henry C. McDowell, United States District Judge, Western District of Virginia. Luther B. Way, United States District Judge, Eastern District of Virginia.

[fol. 668] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME FOR FILING RECORD—November 18, 1931

Good cause appearing therefor it is hereby ordered that the Petitioner in the above-entitled cause may have, and it is hereby allowed, to and including Jany. 18th, 1932, within which to prepare and lodge in the Clerk's Office of this Court a statement of the evidence and file with said Clerk a præcipe in accordance with Equity Rule 75 upon appeal from the decree of the above-named Court made and entered herein on the 16th day of October, 1931, and to docket the said appeal and file the record therein with the Clerk of the Supreme Court of the United States.

This the 18th day of November, 1931.

John J. Parker, United States Circuit Judge, Fourth Circuit. Henry C. McDowell, United States District Judge, Western District of Virginia. Luther B. Way, United States District Judge, Eastern District of Virginia.

[fols. 669 & 670] Citation, in usual form, showing service on Nelson Thomas et al., filed November 19, 1931, omitted in printing.

[fol. 671] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME TO FILE RECORD—December 21, 1931

Good cause appearing therefor it is hereby ordered that the Petitioner in the above-entitled cause may have, and it is hereby allowed, to and including March 18th, 1932, within which to prepare and lodge in the Clerk's Office of this Court a statement of the evidence and file with said Clerk a præcipe in accordance with Equity Rule 75 upon appeal from the decree of the above-named Court made and en-

tered herein on the 15th day of October, 1931, and to docket the said appeal and file the record therein with the Clerk of the Supreme Court of the United States.

This the 21st day of December, 1931.

(Signed) John J. Parker, United States Circuit Judge, Fourth Circuit. (Signed) Henry C. McDowell, United States District Judge, Western District of Virginia. (Signed) Luther B. Way, United States District Judge, Eastern District of Virginia.

[fol. 672] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

To United States of America and Interstate Commerce Commission and the Attorney General of the Commonwealth of Virginia:

Please take notice that the petitioner in the above entitled cause has appealed and does hereby appeal to the Supreme Court of the United States from the final decree of the above-entitled Court heretofore made herein and entered on the 15th day of October, 1931 and from each and every part thereof.

Attached hereto are copies of the petition for appeal, assignments of error, order allowing appeal and citation.

Given under our hands this the 19th day of November, 1931.

(Signed) Theodore W. Reath, (Signed) D. Lynch Younger, (Signed) S. K. Funkhouser, (Signed) Harvey B. Apperson, Solicitors for Petitioner.

[fol. 673] Legal and timely service of a true copy of the hereto attached notice dated the 19th day of November, 1931, and true copies of the thereto attached Petition for Appeal, Assignments of Error, Order allowing Appeal and Citation, in the case of Norfolk & Western Railway Company, a Corporation, appellant, against United States of America and Interstate Commerce Commission, defendants and appellees is hereby acknowledged, this the 23rd day of November, 1931.

(Signed) Nelson Thomas, Attorney for Interstate Commerce Commission. (Signed) Elmer B. Collins, Special Assistant to the Attorney General of the United States of America. (Signed) T. X. Parsons, Assistant United States Attorney for the Western District of Virginia.

[fols. 674 & 675] Legal and timely service of a true copy of the hereto attached notice dated the 19th day of November, 1931, and true copies of the thereto attached Petition for Appeal, Assignments of Error, Order allowing Appeal and Citation, in the case of Norfolk & Western Railway Company, a Corporation, appellant against United States of America and Interstate Commerce Commission, defendants and appellees is hereby acknowledged, this the 21st day of November, 1931.

(Signed) John R. Saunders, Attorney General for the Commonwealth of Virginia.

[fol. 676] Bond on appeal for $1,000.00, approved and filed November 20, 1931, omitted in printing.

[fol. 677] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD—Filed February 3, 1932

It is hereby stipulated and agreed between the undersigned, counsel for the appellant and counsel for the appellees—

I. That this stipulation is made and filed in lieu of a præcipe and counter-præcipe in this cause.

II. That subject to the approval of the Judge of the District Court, the Clerk of said court shall in addition to the transcript of the record hereinafter referred to also transmit to the Clerk of the Supreme Court of the United States all of the original exhibits which have been filed in this cause, both with the pleadings and with the evidence introduced

before said District Court, so that said exhibits may be available for the use of said Supreme Court and counsel in this cause, and that after the final determination of this cause by the said Supreme Court, all of said original exhibits shall be returned by the Clerk thereof to the Clerk of said District Court.

III. That the transcript of the record in this cause to be [fol. 678] compiled by the Clerk of the District Court shall consist of, and he shall include the following papers and none others:

(1) Petition and Exhibit filed therewith.
(2) Answer of the United States of America.
(3) Answer of the Interstate Commerce Commission, without exhibits.
(4) Statement of testimony and proceedings had at final hearing, which statement consisting of 284 pages is attached hereto, and which includes a statement of the testimony introduced before the Interstate Commerce Commission and later introduced before the District Court, and which statement counsel agree is a true and correct statement of the testimony so introduced.

The following Exhibits (which were introduced in evidence before the Commission):

(5) Exhibit No. 4, Dunglinson.
(6) Exhibit No. 5, Dunglinson.
(7) Exhibit No. 6, Dunglinson.
(8) Exhibit No. 19, Booth.
(9) Exhibit No. 20, Booth.
(10) Exhibit No. 21, Booth.
(11) Exhibit No. 48, Dunglinson.
(12) Exhibit No. 49, Dunglinson.
(13) Exhibit No. 50, Dunglinson.
(14) Exhibit No. 51, Dunglinson.
(15) Exhibit No. 52, Dunglinson.
(16) Exhibit No. 53, Dunglinson.
(17) Exhibit No. 54, Field.
[fol. 679] (18) Exhibit No. 73, Dunglinson.
(19) Exhibit No. 74, Field.

(Also the following exhibits introduced in evidence at the final hearing of the case in the District Court):

(20) Defendants' Exhibit No. 3. (Letter from the Commission's Bureau of Accounts to the petitioner's comptroller, W. H. Wilson, dated January 20, 1928. Attached to the above letter is a copy of Commission's order of June 14, 1928 which order is set out in the Commission's report filed as Exhibit A with the petition herein. Said order need not again be copied by the Clerk of the District Court).

(21) Defendants' Exhibit No. 4. (Petition of Norfolk & Western Railway Company for Reconsideration, February 28, 1928).

(22) Defendants' Exhibit No. 5. (Supplemental order of the Commission of July 24, 1928).

(23) Defendants' Exhibit No. 6. (The Commission's Accounting Regulations).

(24) Defendants' Exhibit No. 7. (The Commission's Rules of Practice).

(25) Defendants' Exhibit No. 8. (Commission's Tentative Recapture Report as to Excess Income of Norfolk & Western Railway Company and protest thereto by said company).

(26) Final decree of District Court entered on October 15th, 1931.

(27) Opinion of District Court filed October 15, 1931.

(28) Petition for appeal filed November 14, 1931.

(29) Assignment of Errors filed November 14, 1931.

(30) Order allowing appeal entered November 18, 1931. [fol. 680] (31) Order entered November 18, 1931 enlarging time to and including January 18, 1932 and order entered 21st day of December 1931, enlarging time to and including the 18th day of March, 1932, within which to prepare and lodge in the Clerk's Office of the District Court a statement of the evidence and to file therein a præcipe and to docket this Appeal and file the record therein with the Clerk of the Supreme Court of the United States.

(32) Citation issued on Appeal from final decree and acknowledgment of service thereof.

(33) Notice of appeal directed to the United States of America, the Interstate Commerce Commission and the Attorney General of the Commonwealth of Virginia with acknowledgment of service thereof.

(34) Bond on appeal from final decree with certificate showing its approval by District Court.

(35) The original citation showing acknowledgment of service thereof by the defendants should accompany the transcript.

(36) Any and all orders which may be entered by the District Court not herein specifically enumerated.

(37) This stipulation of counsel.

(38) Clerk's certificate of transcript of record. Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States.

Harvey B. Apperson, of Counsel for Norfolk & Western Railway Company, Petitioner. (Signed) Nel-
[fol. 681] son Thomas, Counsel for Interstate Commerce Commission. (Signed) Elmer B. Collins, Counsel for United States of America.

February 3d, 1932.

[fol. 682] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ON STIPULATION AND STATEMENT OF TESTIMONY—February 3, 1932

This day came the Norfolk and Western Railway Company, petitioner, by its attorneys, and came also the defendants, United States of America and Interstate Commerce Commission, by their respective attorneys, and it appearing that said parties by their respective attorneys by a signed stipulation in writing have agreed, subject to the approval of this Court, upon a statement of the testimony introduced in this cause and of what the record herein on appeal shall consist and include, and have further agreed that the original exhibits filed in this cause may be certified as a part of the record on appeal and transmitted by the Clerk of this Court to the Clerk of the Supreme Court of the United States, and that when so transmitted the same may be used by said Supreme Court or by counsel in this cause, it is ordered

(1) That said stipulation so agreed upon and signed by said attorneys be and the same is hereby approved and said stipulation shall be in lieu of the filing of a præcipe or counter præcipe in this cause, and

(2) That the said statement of the testimony introduced in this cause and so agreed upon is a true, complete and [fol. 683] properly prepared statement of the substance of all of the testimony introduced and admitted upon the trial of this cause, all particulars not essential to the decision of the question being omitted, and that said statement consisting of 284 pages be and the same is hereby filed, settled, allowed and approved as the Statement of the Evidence in the Appeal of the above entitled cause, and

(3) That the Clerk of this Court is directed to seasonably certify as a part of the record on appeal and transmit to the Clerk of the Supreme Court of the United States all of the original exhibits filed in this cause both with the pleadings and the testimony so that said exhibits may be available for the use of said Court and counsel at the hearing of this cause, provided however that said exhibits shall be kept safe by the Clerk of said Supreme Court, and upon the final determination of this cause upon appeal said exhibits shall be returned by the Clerk of the said Supreme Court to the Clerk of this Court and when so returned shall be filed with the papers in this cause.

Dated this the 3rd day of February, 1932.

(Signed) John J. Parker, United States Circuit Judge. (Signed) Luther B. Way, United States District Judge.

Within order approved.

(Signed) Elmer B. Collins, Counsel for United States. (Signed) Nelson Thomas, Counsel for Interstate Commerce Commission. (Signed) Harvey B. Apperson, of Counsel for Norfolk & Western Railway Company, Petitioner.

[fol. 684] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S MEMORANDUM

I, L. T. Hyatt, Clerk of the United States District Court for the Western District of Virginia, at Roanoke, Virginia, certify as follows:

That petition for appeal was filed November 14, 1931;

That order allowing appeal was made on November 18, 1931;

That appeal bond is dated November 18, 1931, in penalty of $1,000.00, and was filed November 20, 1931; and that the obligors in said bond are Norfolk & Western Railway Company, a corporation, principal, and United States Fidelity & Guaranty Company, a corporation, surety. Said bond being for costs.

That citation is dated November 18, 1931, and service thereof accepted by the defendants on November 23d, 1931.

That the original papers named in this memorandum have been sent to the Clerk of the United States Supreme Court this 5th day of March, 1932.

L. T. Hyatt, Clerk, by Frank J. Hall, Deputy.

[fol. 685] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 686 & 687] In Supreme Court of the United States

Designation of Record and Stipulation—Filed March 17, 1932

Come now the parties by their respective counsel and designate for printing the following portions of the record in the above-entitled case, and in addition thereto stipulate and agree, as hereinafter set out, concerning certain portions of the record not to be printed.

The Clerk shall print the following portions of the record:

(1) The petition filed by appellant in the lower court, together with exhibit filed therewith.

(2) Answer of the United States of America.

(3) Answer of the Interstate Commerce Commission.

(4) Statement of testimony and proceeding had at final hearing, which statement includes statement of testimony [fol. 688] introduced before the Interstate Commerce Commission and later introduced before the District Court as a part of the transcript of proceedings before the Commis-

sion, and which statement of testimony counsel have agreed is a true and correct statement of the testimony so introduced.

(The following exhibits introduced in evidence before the Commission).

(5) Exhibit No. 4, Dunglinson.
(6) Exhibit No. 5, Dunglinson.
(7) Exhibit No. 6, Dunglinson.
(8) Exhibit No. 19, Booth.
(9) Exhibit No. 20, Booth.
(10) Exhibit No. 21, Booth.
(11) Exhibit No. 48, Dunglinson.
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(13) Exhibit No. 50, Dunglinson.
(14) Exhibit No. 51, Dunglinson.
(15) Exhibit No. 52, Dunglinson.
(16) Exhibit No. 53, Dunglinson.
(17) Exhibit No. 54, Field.
(18) Exhibit No. 73, Dunglinson.
(19) Exhibit No. 74, Field.

(Also the following exhibits introduced in evidence at the final hearing of the case in the District Court.)

(20) Defendants' Exhibit No. 3. (Letter from Commission's Bureau of Accounts to the appellant's comptroller, W. H. Wilson, dated January 20, 1928. Attached to the above letter is a copy of the Commission's order of June 14, [fol. 689] 1928, which order is set out in the Commission's report which will be printed as Exhibit "A" with the petition herein, and said order shall not again be printed as a portion of said Exhibit No. 3.)

(21) Defendants' Exhibit No. 4. (Petition of Norfolk & Western Railway Company for reconsideration filed with the Interstate Commerce Commission February 28, 1928.)

(22) Defendants' Exhibit No. 5. (Supplemental order of the Commission of July 24, 1928.)

(23) The following portions of defendants' Exhibit No. 6 (which exhibit consists of two pamphlets containing the Interstate Commerce Commission's Classification of Investment of Road and Equipment and instructions for making up the accounts provided for in such classification, issued by order of the Commission May 19, 1914, pursuant to the authority of the Interstate Commerce Act), it being stipu-

lated and agreed that no portion of said Exhibit 6 shall be printed except that hereinafter stated, and that the printing of this stipulation shall constitute the printing in this paragraph provided for:

Text Pertaining to General Balance Sheet Accounts

Debits

701. Investment in Road and Equipment.—This account shall include the accounting company's investment in road and equipment (including that held under contract for purchase) in existence at the date of the balance sheet. The accounting company's records shall be kept in such manner as to show the amount credited to this account, subsequent to June 30, 1914, for property retired, the cost of which was included in the account of that date.

• • • • • • •

705. Miscellaneous Physical Property.—This account shall include the accounting company's investments in physical property other than transportation property assignable [fol. 690] to accounts Nos. 701 and 702, including hotels, restaurants, commercial power plants, etc., which are entirely distinct from transportation property and are not operated in connection with the transportation service of the accounting company.

Items of Investment

Coal and other mines, commercial power plants, hotels and restaurants, lands and buildings not used in transportation operations, lands and other property acquired and held in anticipation of future use, mineral and timber lands, rails and other track material leased to others, sawmills and other manufacturing plants not operated in connection with transportation service.

1. Accounts for Investment in Road and Equipment.—The accounts prescribed in this classification are designed to show the investment of the carrier in property devoted to transportation service. The carrier's investment in physical property other than transportation property is

provided for in balance-sheet account No. 705, "Miscellaneous physical property." The carrier means the accounting carrier, except otherwise specifically indicated. The carrier's records shall be kept in such form that expenditures for additions and betterments may be reported separately from those for original road, original equipment, and road extensions, and shall show separately the expenditures under each authorized addition and betterment project. (See balance-sheet account No. 701, "Investment in road and equipment" and No. 702, "improvements on leased railway property.")

(24) The following portions of defendants' Exhibit No. 7 (the Interstate Commerce Commission's Rules of Practice, approved December 2, 1929, promulgated pursuant to the Interstate Commerce Act, together with additional order or ruling specifically applicable to recapture proceedings, promulgated May 4, 1931), it being stipulated and agreed that of said rules only the Commission's order relative to the rules of practice in recapture proceedings need be printed and that the printing of this stipulation shall constitute the printing provided for in this paragraph. Said rules of practice in recapture proceedings are as follows:

[fol. 691] ORDER

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 4TH DAY OF MAY, A. D., 1931

In the Matter of Rules and Regulations for the Determination and Recovery of Excess Income under Section 15a of the Interstate Commerce Act

The Commission having under consideration Section 15a (9) and Section 17 (1) of the Interstate Commerce Act:

It is ordered that the following special rules of procedure for the determination of excess income be, and the same are hereby, adopted and prescribed, effective from and after the date of this order, to-wit:

Tentative Recapture Reports.—In proceedings under Sec. 15a of the Interstate Commerce Act for the determina-

tion and recovery of excess net railway operating income the Commission will prepare a tentative report of its findings in respect to the excess income of any common carrier for any year or years, which will include a statement of the value of the property devoted to common carrier purposes, the net railway operating income, and the amount of money payable to the Commission.

Service.—The Commission will serve the tentative report upon the carrier, the Attorney General of the United States, and upon such additional parties as the Commission may prescribe. Service of the tentative report upon a common-carrier shall be effected by leaving a copy thereof with the designated agent of the carrier in Washington, D. C., or if no such agent has been designated, by posting a copy in the office of the Secretary of the Commission; service upon any party not a common-carrier shall be effected by delivering in person or by mailing a copy to such party.

Protests of Tentative Reports.—Protests of tentative reports shall be filed with the Commission within 40 days after the day on which the tentative report was served or mailed; Provided, however, that for good cause shown upon application made as prescribed in Rule XIV (c) of the Rules of Practice before the Commission, the Commission may extend the time for filing protests. If no protest is filed within the time allowed, the tentative report and order shall become, and be, upon the order of the Commission, a final determination of the matters reported therein.

Hearings.—At hearings on protests of tentative reports [fol. 692] the protestant shall appear and present evidence in support of its protest, and the bureaus of the Commission may thereupon present evidence. Upon failure of the protestant to so appear and support its protest the tentative report may by further order of the Commission be made final as to all matters and determinations therein, as if no protest had been filed.

Rules of Practice Before the Commission Adopted; Where Applicable.—The following provisions of the Rules of Practice before the Commission, so far as they relate to matters of procedure in valuation cases under Sec. 19a of the Act, shall apply to proceedings for the determination and recovery of excess income:

Rule II (h), relating to the designation of certain parties as "protestants".

Rule II (l), governing petitions for interventions.

Rule IV-A, governing protests of tentative reports.

Rule VI (d), governing filing and service of protests, motions, petitions and briefs.

Rule VII, relating to amendments of protests.

Rule X (a) and (c), relating to assignment of cases for hearing, examination of witnesses and production of evidence.

Rule XI (h), governing taking of depositions.

Rule XIII (h) and (i), relating to receipt in evidence of exhibits, and copies of same required.

Rule XIV (e), governing filing of briefs and making oral arguments before an examiner or commissioner.

Rule XVI (b), providing that no copies of the transcript will be furnished by the Commission.

Rule XXI (e), relating to the signatures and showing of post office addresses of parties signing protests, motions, or other papers.

All other provisions of the Rules of Practice before the Commission as far as applicable to proceedings for the determination and recovery of excess income, not inconsistent with the rules herein expressly made therefor, shall apply in such cases.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 693] (25) Final decree of the District Court entered on October 15, 1931.

(26) Opinion of the District Court filed October 15, 1931.

(27) Petition for appeal filed November 14, 1931.

(28) Assignment of errors filed November 14, 1931.

(29) Order allowing appeal entered November 18, 1931.

(30) Order entered November 18, 1931, enlarging time to and including January 18, 1932, and order entered 21st day of December, 1931, enlarging time to and including 18th day of March, 1932, within which to prepare and lodge in the Clerk's Office of the District Court a statement of the evidence and to file therein a præcipe and to docket the appeal and file the record therein with the Clerk of the Supreme Court of the United States.

(31) Citation issued on appeal from final decree and acknowledgment of service thereof.

(32) Notice of appeal directed to the United States of America, the Interstate Commerce Commission and the

Attorney General of the Commonwealth of Virginia with acknowledgment of service thereof.

(33) Clerk's certificate of transcript of record.

(34) Stipulation of counsel relative to preparation of transcript of record dated 3rd day of February, 1932, and order of Court approving same entered under date of 3rd day of February, 1932.

[fol. 694] (35) This designation of record and stipulation entered into by counsel for appellant and appellees on the 10th day of March, 1932.

As to the defendant's Exhibit No. 8, it is stipulated that same is the Commission's tentative recapture report as to excess income of the Norfolk & Western Railway Company and that in said tentative recapture report the collieries involved in this case are classified as non-carrier property, and that the Norfolk & Western Railway Company filed its protest to said recapture report under date of March 13, 1931, in which protest it is alleged and charged that the Commission in said recapture report had erroneously classified the said collieries as non-carrier property; it is further stipulated that the issues raised by said tentative recapture report and said protest are still pending and undetermined before the Commission, and it is further stipulated and agreed that no portion of said tentative recapture report, nor of said protest thereto, need be printed by the Clerk of the Supreme Court.

It is further stipulated and agreed that the Clerk of the Supreme Court of the United States is directed to print only this stipulation and the papers herein specifically enumerated, and the undersigned counsel agree that this stipulation shall constitute a compliance with the provisions of subsection 9 of Rule 13 of the Supreme Court of the United States, except as to the portion thereof which directs the appellant herein to file with said Clerk a statement of the points upon which it intends to rely, the filing of which said statement of points is not waived by counsel for the appellees [fols. 695 & 696] and shall be filed by counsel for the appellant.

This the 10th day of March, 1932.

Elmer B. Collins, Counsel for United States of America. Nelson Thomas, Counsel for Interstate Commerce Commission. Harvey B. Apperson, of Counsel for Norfolk & Western Railway Company.

[fol. 697] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY AND THE PARTS OF THE RECORD BELIEVED NECESSARY FOR CONSIDERATION THEREOF—Filed March 17, 1932

This proceeding was instituted in the United States District Court for the Western District of Virginia and was heard by three judges under the provisions of the so-called District Court Jurisdiction Act, upon Appellant's petition to enjoin, restrain and set aside a certain order of the Interstate Commerce Commission. The order in question was entered by the Commission on January 5, 1931, in a proceeding entitled "In the Matter of a Uniform System of Accounts, Ex Parte No. 100," and dealt with the classification of and accounting to be observed and followed by the Appellant for its investment in collieries owned by it and devoted exclusively to the production of coal used by the [fol. 698] carrier in performing its transportation services, accounting for the expenses of operating those collieries, and the charging into the carrier expenses of the cost of producing the coal used.

The Commission's order required:

(a) That the carrier's investments in those collieries shall be classified as investments in non-carrier property and included in balance sheet account No. 705, "Miscellaneous Physical Property," whereas Appellant contended that the investments should be classified as carrier investments and included in Account 701, "Investment in Road and Equipment."

(b) That a clearing account should be kept for the operation of each colliery to include the detailed costs of operation, with provisions for including in such costs a charge for depletion.

(c) That charges to the carrier's operating expenses for the coal produced in those collieries and used in the carrier operations "shall be upon the basis of the average monthly cost per ton for producing the coal each month."

(d) And there were other provisions for reports to the Commission concerning the operation of these collieries, etc.

The District Court (composed of Circuit Judge Parker and District Judges McDowell and Way in accordance with the provisions of the statute) refused the injunction and dismissed the petition, 52 Fed. (2nd) 967, and this appeal was taken.

[fol. 699] Points on Which Appellant Intends to Rely

The points upon which the appellant intends to rely are as follows:

1. That the order of the Commission entered on January 5, 1931, in the proceeding entitled "In the Matter of a Uniform System of Accounts, Ex Parte No. 100," (hereinafter referred to as the order of the Commission) is arbitrary and void because it is not supported by substantial evidence and is contrary to the uncontradicted evidence in that proceeding and the District Court erred in failing to enjoin, set aside and annul the order for those reasons (Assignment of Errors Nos. III and IV).

The uncontradicted evidence showed that the properties in question are owned by the Appellant, were acquired solely for the purpose of providing a part of the fuel used in its carrier operations, are used solely for that purpose and (under limitations in the title papers) may not be used for other purposes and that the properties are therefore held for and used in the service of transportation. Accordingly, the classification of those properties as non-carrier by the Commission, and the order requiring accounting for investment and expenses as such, was arbitrary and void because unsupported by evidence and contrary to the evidence.

2. The order of the Commission and the action of the District Court in making the decree and dismissing the petition, in sustaining the action of the Commission and in re-
[fol. 700] fusing to grant the relief prayed for, were bases upon erroneous conceptions and theories of the law (Assignment of Errors Nos. V and VI), in the following respects:

(a) In holding that the classification of the collieries in question, and the requirements as to accounting for investments, expenses, etc., are matters within the discretion vested in the Commission under the Interstate Commerce Act (Section 20, Paragraphs 1 and 5), whereas the law

requires that the Commission must exercise its powers "fairly and reasonably within the grant of power constitutionally conferred by Congress", and the action of the Commission requiring classification and accounting in disregard of the characteristics, use and ownership of the property is not a fair and reasonable exercise of any power conferred upon it.

(b) In holding that petitioner's collieries are non-carrier or non-transportation properties, and requiring classification and accounting in accordance therewith, because coal mining is said to be a business entirely separate and distinct from the business of transportation, coal mining is not commerce or transportation, and mining of coal to be used in transportation is not so closely related to transportation that the mines may properly be treated as transportation equipment. The mining of coal in the collieries in question, according to uncontradicted evidence, is not a business separate and distinct from the Appellant's transportation business, is not an independent business, but is wholly in-
[fol. 701] cident to and for the purpose of aiding in the performance of its transportation services.

(c) In holding that a carrier may go into a business of manufacturing various commodities for their own use in transportation, but that when they do so they engage in "a business which is separate and distinct from the business of transportation itself." Some carriers do engage in manufacturing articles for their own use. When the facilities are owned by a carrier, when their use is confined to the production of commodities or supplies for the transportation service, when they are solely incident to the performance by the carrier of its transportation service, such facilities are properly to be considered as transportation or carrier property. And the Commission itself so classifies many such facilities.

(d) In holding that property employed in transportation is dedicated to public use, that petitioner's collieries are not dedicated to the use of the public, and that therefore the collieries are not transportation property. The collieries in question are dedicated to the public use in the production of fuel to enable the carrier to conduct its transportation operations.

(e) In holding that the petitioner's collieries are non-carrier or non-transportation properties because "they stand upon the same basis with respect to the public service as do plants for manufacturing cars or locomotives." Such [fol. 702] plants, when owned by a carrier, and used solely for the production of cars or locomotives to be used in the transportation service, are properly to be considered as transportation properties and are so classified by the Commission.

(f) In holding that the collieries in question are non-carrier or non-transportation property because they may be sold or leased by the carrier although "a railroad may not abandon service on its railroad lines and may not lease or sell them without the consent of the Commission." The right to alienate is unrelated to the question. Many properties owned by a railroad other than collieries, which are indisputably carrier property, including locomotives, cars, depots, etc., may be sold, leased or abandoned by the carrier without the consent of the Commission. The limitation upon the right to sell, lease or abandon applies only to the abandonment of the "line of railroad" and service over such line, (Section 1, Paragraph 18, of the Interstate Commerce Act) and not to the alienation of carrier properties such as collieries, cars, locomotives, depots, etc.

(g) In holding that Appellant's collieries are different from other kinds of property, not directly engaged in the movement of freight and passengers, but which are owned by a carrier and devoted to the production of commodities used in and essential for the conduct of the transportation [fol. 703] service. Power plants, gas plants, water plants, etc., when owned by a carrier and engaged exclusively in the production of commodities used by the carrier in its transportation service, are properly to be regarded as transportation or carrier properties, are so classified by the Commission, and Appellant's collieries may not be distinguished from such properties.

(h) In holding that the classification of Appellant's collieries "may properly rest upon the customs and practices of carriers rather than upon the logical formulas or analytical reasoning with reference to use."

(i) In holding that the classification of Appellant's collieries as non-carrier property is justified by the facts that

most railroads have no coal mines, the Commission has in the past classified such mines as non-carrier properties, and all railroads including the Appellant have followed that classification. The evidence shows that the classification of coal mines as non-carrier property was made years ago, at a time when no railroad owned coal mines for the sole purpose of producing fuel used in its transportation operations, such as Appellant's collieries. It was designed to provide for the classification of and accounting in connection with investments of carriers in coal mines engaged in producing coal commercially. Accordingly, the past classification by the Commission of such mines, and the [fol. 704] acquiescence by the carriers in such classification, may not be regarded as determinative of the proper classification of Appellant's collieries.

(j) In holding that "all transportation in the sense in which we are using the term here is commerce," although the term transportation properly includes all facilities held for and used in the service of transportation, many of which are not commerce. Power plants, gas plants, water plants, tie-treating plants, etc., are all properly classified as transportation properties when owned by a carrier and used in a manner similar to the collieries in question, and are so classified by the Commission, but are no more to be regarded as commerce than Appellant's collieries.

(k) In holding that even if the collieries "ought logically to be classified under transportation property" nevertheless the classification as non-carrier property would be fair and reasonable. A classification which is illogical cannot be fair and reasonable.

(l) In holding that the classification of Appellant's collieries as non-carrier property is justified because most railroads own no collieries and "unless the classifications prescribed are such that transportation property means practically the same thing with reference to the property of any carrier to which the classification may be applied, the reports to the Commission will have little value, and it will be without the information necessary to enable it to perform the important duties required of it by Con- [fol. 705] gress." Here the Court suggests a requirement of uniformity of property accounted for, and not a uniform

method or system of accounting for property actually owned. Whether other carriers own like property cannot be determinative of the proper classification in disregard of the characteristics, use and ownership of the property. It could as well be suggested that open top, hopper bottom coal cars owned by petitioner and used in the transportation of coal should be classified as non-carrier because other railroads do not own such cars and the accounts would not be comparable if such cars were included for an owning carrier and not for the other carrier which owns none.

3. The order of the Commission is beyond the power constitutionally conferred upon it and void, and the Court erred in making the decree and dismissing the petition, in sustaining the action of the Commission and in refusing to grant the relief prayed for, because the order of the Commission constitutes an invasion upon the managerial discretion which petitioner is entitled under the law of the land to exercise as to its property (Assignment of Error No. VII).

Petitioner is entitled under the law of the land in its discretion to keep accounts of its properties to represent truly the facts of ownership, characteristics, use and operation of the properties. No power has been conferred by [fol. 706] Congress upon the Commission to require a classification of property or accounting contrary to those facts. The Commission's order is contrary to the facts and is an unwarranted invasion upon the carrier's managerial discretion.

(4) The order of the Commission is void and the Court erred in making the decree and dismissing the petition, in sustaining the action of the Commission and in refusing to grant the relief prayed for, because the order of the Commission constitutes a taking of petitioner's property without just compensation in violation of the Fifth Amendment of the Constitution of the United States (Assignment of Error No. VIII).

The effect of the Commission's order is to deny to the carrier an opportunity to earn a fair return upon the value of the collieries in question. In classifying the collieries

as non-carrier property, the Commission excludes them from the rate base upon which the carrier (under the provisions of Section 15-A of the Interstate Commerce Act) is entitled to earn a fair return before any of its income is subject to recapture under the provisions of that section. By ordering the carrier to keep separate accounts to show the cost of producing coal in those mines, and to charge to its carrier operating expenses for the coal consumed in its carrier operations only the average actual monthly cost of producing the coal, the Commission would [fol. 707] prevent the carrier from reflecting in those charges any interest upon investment in or return upon value of those collieries. Thus, the carrier is left in the position of owning properties devoted exclusively to the production of fuel for its transportation service, but under the order of the Commission would be prevented from securing a return upon its investment or upon the value of those properties.

Parts of the Record Believed Necessary for Consideration of the Foregoing Points

Appellant believes that the entire record, printed in accordance with the stipulation of the parties, is necessary for the consideration of the foregoing points.

Theodore W. Reath, S. King Funkhouser, D. Lynch Younger, Harvey B. Apperson, Counsel for Norfolk and Western Railway Company, Appellant.

Legal and timely service of the foregoing is acknowledged this 17th day of March, 1932.

Thomas D. Thacher, Solicitor General (A. J.), Counsel for United States of America. Daniel W. Knowlton, Counsel for the Interstate Commerce Commission.

[fol. 708] [File endorsement omitted.]

Endorsed on cover: File No. 36,610. W. Virginia D. C. U. S. Term No. 18. Norfolk & Western Railway Company, appellant, vs. The United States of America and Interstate Commerce Commission. Filed March 16, 1932. File No. 36,610.

FILE COPY

APR 4 19

IN THE

Supreme Court of the United States

No. 796. / 8 OCTOBER TERM, 1931.

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

Jurisdictional Statement.

THEODORE W. REATH,
S. KING FUNKHOUSER,
D. LYNCH YOUNGER,
HARVEY B. APPERSON,
Counsel for Appellant.

March 28, 1932.

IN THE

Supreme Court of the United States

No. 796. October Term, 1931.

NORFOLK AND WESTERN RAILWAY COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

JURISDICTIONAL STATEMENT.

Now comes Appellant, by Counsel, and submits the following Jurisdictional Statement pursuant to Rule 12 of this Court.

This is an appeal of right from the District Court of the United States for the Western District of Virginia in which Appellant seeks a review of the final judgment or decree of a special three-judge Court dismissing Appellant's petition in a suit by it to set aside and annul a certain order of the Interstate Commerce Commission to enjoin and restrain said Commission from enforcing the same.

(a) Jurisdiction is conferred on this Court by the Act of October 22d, 1913, Chapter 32; 38 Stat. 220; Title 28, Section 47a U. S. C. A.; Act of February 13, 1925, Chapter 229, 43 Stat. 938; Title 28, Section 345 U. S. C. A., known as the District Court Jurisdiction Act, giving a right of appeal direct to the Supreme Court in such cases:

(b) The decree to be reviewed was entered by the United States District Court for the Western District of Virginia on October 15th, 1931, Transcript Page 649, said Court being composed of the Honorable John J. Parker, United States Circuit Judge, Fourth Circuit; the Honorable Henry C. McDowell, United States District Judge Western District of Virginia, and the Honorable Luther B. Way, United States District Judge Eastern District of Virginia.

The application for the appeal was presented on November 14th, 1931, Transcript Page 661, and the appeal was granted on November 18th, 1931, Transcript Page 669.

An order enlarging the time to January 18th, 1932, within which to docket the appeal and file the record therein in this Court was entered by said District Court on November 18th, 1931, Transcript Page 670. A further order of enlargement of the time to and including March 18th, 1932, within which to docket the appeal and file the record therein in this Court was entered by said District

Court on December 21st, 1931, Transcript Page 673.

(c) This proceeding was instituted in the United States District Court for the Western District of Virginia, at Roanoke, Virginia, against the Interstate Commerce Commission and the United States of America by the Norfolk and Western Railway Company, a common carrier having its residence and principal place of business at Roanoke in said District of Virginia, to set aside and annul a certain order of the Interstate Commerce Commission and to enjoin and restrain said Commission from enforcing the same. The order of said Commission sought to be set aside, annulled, enjoined and restrained was entered on January 5th, 1931, Transcript Page 37, and classified certain collieries owned and operated by said carrier as non-transportation property instead of transportation property, as the Carrier contended they should be classified. The said order also required that the said collieries be included in Account Number 705 (Non-carrier or Non-transportation property) instead of Account Number 701 (Carrier or Transportation Property) as the Carrier contended, Transcript Page 27.

(d) The jurisdiction is believed to be sustained by the case of KANSAS CITY SOUTHERN RAILROAD COMPANY v. UNITED STATES, 231 U. S. 423.

WHEREFORE, it is prayed that jurisdiction on appeal be noted.

Respectfully,

THEODORE W. REATH,

S. KING FUNKHOUSER,

D. LYNCH YOUNGER,

HARVEY B. APPERSON,
Counsel for Appellant.

March 28, 1932.

FILE COPY

SEP 17 1932

IN THE

Supreme Court of the United States

No. 18 OF OCTOBER TERM, 1932.

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellees.

BRIEF OF NORFOLK AND WESTERN RAILWAY COMPANY, APPELLANT.

S. KING FUNKHOUSER,
D. LYNCH YOUNGER,
HARVEY B. APPERSON,
F. MARKOE RIVINUS,
THEODORE W. REATH,
Of Counsel for Norfolk and Western Railway Company, Appellant.

SEPTEMBER 16, 1932.

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In the Supreme Court of the United States.

No. 18 of October Term, 1932.

Norfolk and Western Railway Company, Appellant,

v.

The United States of America and Interstate Commerce Commission, Appellees.

BRIEF OF NORFOLK AND WESTERN RAILWAY COMPANY, APPELLANT.

1.

The opinion of the Court below is reported as Norfolk and Western Railway Company v. United States, 52 F. (2d) 967; and will also be found reprinted in the Record (R. 305).

2.

CONCISE STATEMENT OF THE CASE.

This is an appeal from the decision of a statutory three-Judge District Court (Western District of Virginia), after hearing, refusing an injunction to restrain an accounting order of the Interstate Commerce Commission made (under Section 20 of the Interstate Commerce Act) after hearing, requiring the Norfolk and Western Railway Company to carry the investment in the fuel coal mines of the Railway Company in Account 705 of the Interstate Commerce Commission's Classification of Accounts as property not held for and used in the service of transportation and requiring the carrier to continue charging as an operating expense only the actual cost of production of said coal. The Order of the Commission was attacked *inter alia* as not due process of law under the Fifth Amendment of the Federal Constitution. The petition of the Railway Company to the Interstate Commerce Commission was for authority to place the fuel coal mines in Account 701, Investment in Road and Equipment, and had been denied.

In the Interstate Commerce Commission's Classification of Accounts for Steam Roads Account 701 is as follows:—

"701. INVESTMENT IN ROAD AND EQUIPMENT. This account shall include the account-

ing company's investment in road and equipment (including that held under contract for purchase) in existence at the date of the balance sheet. The accounting company's records shall be kept in such manner as to show the amount credited to this account subsequent to June 30, 1914, for property retired, the cost of which was included in the account of that date."

And Account 705 is as follows:—

"705. MISCELLANEOUS PHYSICAL PROPERTY.

This account shall include the accounting company's investments in physical property other than transportation property assignable to accounts Nos. 701 and 702, including hotels, restaurants, commercial power plants, etc., which are entirely distinct from transportation property and are not operated in connection with the transportation service of the accounting company.

Items of Investment.

Coal and other mines.
Commercial power plants.
Hotels and restaurants.
Lands and buildings not used in transportation operations.
Lands and other property acquired and held in anticipation of future use.
Mineral and timber lands.
Rails and other track material leased to others.
Sawmills and other manufacturing plants not operated in connection with transportation service."

The opinion of the District Court observes (R. 306) that "there is practically no dispute

about the facts." Judge Parker's summary is as follows:—

> "Complainant is a common carrier by railroad engaged in interstate commerce. It owns three large collieries in West Virginia, which were purchased for the purpose of furnishing a part of the coal supply which it required. Two of these were purchased in 1917, and one in 1920. The total estimated tonnage of all the properties at the time of purchase, including leases subsequently acquired, was 53,103,000 tons. The total of the coal mined up to September 30, 1928, was 8,476,058 tons. The estimate as to the period which will be required for the exhaustion of the coal in the various collieries under normal conditions of production reckoned from the year 1928, is 17 years, 33 years, and 35 years respectively. The fuel requirements of complainant are about 3,250,000 tons of coal per annum; and, from the collieries in question, approximately 48 per cent. of this requirement is obtained. Their entire output, except for small amounts of coal furnished to mine employees, is consumed in carrier operations.
>
> "The investment of complainant in these coal properties, including the purchase cost of the original properties, the cost of subsequently acquired leaseholds, and the cost of additions and betterments, was $3,661,-

036.63 as of September 30, 1928. The debits for depreciation and depletion as of the same date were $1,010,569.35, leaving a net capital investment as of that date of $2,650,467.28. Since the opening transaction, the investment has been carried by complainant in balance sheet account 705, which covers investments in physical property other than transportation property.

"On August 3, 1927, complainant addressed a letter to the Commission requesting that it be allowed to transfer the investment from account 705 to account 701, which covers investment in road and equipment. In response to this the Commission on January 14, 1928, entered an *ex parte* order directing that the investment be carried under account 705. Complainant thereupon petitioned for a rehearing, and a supplemental order was entered postponing the effective date of the original order and setting the matter down for hearing and argument. Extensive hearings were then held; and, on January 5, 1931, the Commission entered the order, which we are asked to enjoin, directing that the investment be carried under account 705 and providing, among other things, that the charges to account 716, 'Material and supplies,' for coal produced for consumption in complainant's transportation operations be upon the basis of the average monthly cost per ton of producing the coal."

It appears (see Exhibits stipulated by counsel for all parties with the approval of the District Court as available for the use of this Court, R. 323-4) that limitations in the leases to the Railway Company prohibit the sale of coal commercially.

The order of the Commission was made in exercise of the accounting power of the Commission in Section 20 of the Interstate Commerce Act. This is a power to prescribe fairly and reasonably the manner in which the uniform system of accounts shall be kept and to prescribe the forms of any and all accounts, records and memoranda to be kept by the Carrier (Paragraph (5)).

The Commission in the case at Bar (171 I. C. C., page 562) said:—

> "By section 19a of the interstate commerce act, we were directed among other things to inventory the property of carriers subject to the provisions of the act; to report certain costs and values with respect to *property owned or used for purposes of a common carrier;* and to show separately *the property held for purposes other than those of a common carrier.*"

The Commission (page 563) also made this explanation of statutory interrelation governing

the Commission in the exercise of the accounting power:—

> "By section 15a of the act we were directed to prescribe rates yielding as nearly as may be a fair return upon the aggregate value of the *railway property* of such carriers *held for and used in the service of transportation.* It was also provided that the value finally ascertained pursuant to section 19a for the railway property of any carrier so held and used should be deemed the value thereof for the purpose of determining the aggregate value referred to."

And at the foot of the same page (563) the Commission made this statement of the problem:

> "This brings us to the fundamental question as to whether or not the collieries are transportation property."

The Report and Order of the Commission were expressly declared to be for the purpose of excluding from the value for the rate base (for reasonable carrier rates and for determining confiscation) the value of the fuel mines: and the Report and Order also have the effect of excluding the value of the fuel collieries from consideration as capital for securities issues and all other purposes under the Interstate Commerce Act.

3.

SPECIFICATION OF ERRORS.

Here follows a specification of the assigned errors intended to be urged (R. 315-320).

The District Court erred in holding:—

I.

That the bill lacks equity:

II.

That fuel collieries are non-transportation property:

III.

That the Order of the Commission classifying the collieries as non-transportation property was supported by substantial evidence:

IV.

That the Order of the Commission was not contrary to the evidence:

V.

The District Court erred in holding:—

(*a*) That the Order of the Commission was not arbitrary:

(*b*) That the fuel collieries constitute a business separate from transportation, and in dis-

regarding their use for classification in the accounts:

(*c*) That the use of the collieries to produce fuel coal was separate from the business of transportation:

(*d*) That property employed in transportation, such as the collieries, is not transportation or carrier property unless dedicated to the public use:

(*e*) That there was no legal analogy between the fuel collieries and plants for manufacturing cars or locomotives:

(*f*) That the collieries in question are non-transportation property because they can be sold or leased by the carrier:

(*g*) That the collieries are different in law from other kinds of property, such as power plants, gas plants and water plants:

(*h*) That the classification of the collieries may properly rest upon the customs and practices of carriers:

(*i*) That the classification of the collieries as non-transportation property is justified by the circumstance that most railroads have no coal mines:

(*j*) That transportation is commerce:

(*k*) That even if illogical the classification of the collieries as non-transportation property is within the authority of the Commission.

The District Court erred in holding:—

VI.

That the Report and Order of the Commission were justified for uniformity of accounts of all the carriers:

VII.

That the Order of the Commission was not an invasion of the managerial discretion of the Appellant:

VIII.

That the Order of the Commission did not take away the legal right of the Appellant to have and use fair and reasonable accounting for its property.

(Assignment of Errors V, sub-divisions (b), (c) and (j), (d), (e), (f) and (g).)

NOTE EXPLANATORY OF SEQUENCE OF ARGUMENT:

In the arrangement of the Argument the sequence of the Assignment of Errors has been changed to bring forward to the first place the textual argument on the legal effect of the phrases "held for and used in the service of transportation" in Section 15a of the Interstate Commerce Act: and "for its purposes as a common carrier" in Section 19a of that Act. Other Assignments of Error have been rearranged in logical sequence.

4.

ARGUMENT.

(*A*) THE DISTRICT COURT ERRED IN INTERPRETING AND APPLYING THE LANGUAGE OF THE STATUTE AND HOLDING THAT RAILWAY FUEL MINES ARE NOT PROPERTY OWNED, HELD AND USED IN THE SERVICE OF TRANSPORTATION AND FOR THE PURPOSES OF A COMMON CARRIER, AS FOLLOWS:—

(b), (c) and (j) *Coal mining is a separate business from transportation, and this is decisive of a separate use:*

(d) *Collieries separate because not dedicated to public:*

(f) *Collieries not transportation property because can be sold or leased:*

(g) *Collieries legally different from power plants, gas plants and water plants.*

These six sub-divisions of Assignment V may conveniently be argued together as all present related errors.

(b), (c) and (j) *Collieries not separate business:*—

The procurement by Norfolk and Western Railway Company of fuel for its operations is

the result of a series of continuously connected activities, including (*a*) the acquisition of coal leases for economical production of fuel; (*b*) the organization and housing of mine forces; (*c*) the furnishing of necessary openings and tipples, mine cars, tracks and other facilities; (*d*) the mining of the coal; (*e*) the transfer of the coal produced into the locomotive tenders or power houses; and (*f*) the burning and converting of the coal into power. All these activities culminate in the owning, holding and use "in the service of transportation" (Section 15a) and "for purposes of a common carrier" (Section 19a)—and for no other service and purposes as the record shows.

The Commission's order affirmed by the District Court cuts the chain of activity so as to exclude a method of railway fuel procurement and to exclude the mine properties arbitrarily in the sense of without reason and contrary to the clear intendment of the statute.

The service of transportation and the purposes of a common carrier, which are the phrases of the statute to be interpreted and applied, are accomplished by a variety of connected acts which are not to be considered piecemeal, but as parts of a sequence which produces the result. Textually the statutory phrases indicate broad inclusion—every activity which conduces to the

service or the purpose is included, not merely the final result of transportation or common carriage. Congress did not limit the property to be classified for the rate purpose and as capital for securities issues to property included within the substantive designations "transportation" and common carriage. Broad as are the implications of these substantives even taken alone, Congress evidently intended even broader inclusions by the phrases "service of transportation" and "purposes of a common carrier."

Congress was, of course, well aware that railroad corporations offer a variety of accessorial services and facilities and conveniences which have no relation to transportation or common carriage. Thus the railroads operate grain elevators, hotels, restaurants and the like; and the definition of "transportation" in Section 1, paragraph (3) of the Act to Regulate Commerce includes a lot of accessories which would not otherwise be understood as included in the defined word. Primarily the Congress had in mind in enacting Sections 19a and 15a the ascertainment of the capital base for rate making and directed the classification of property broadly as held, owned or used for the objective "service" or "purpose." Accessories or incidental activities which do not serve or which are not directed to the result of producing transportation or com-

mon carriage are not included. Everything else is included.

Webster's New International Dictionary defines the derivative verb "to serve" as meaning "to wait upon; to supply the wants of."

The Oxford Dictionary gives the meaning of the word service as "Supply of the needs of" persons, occasions and things. Another meaning *similis* is given by The Oxford as "serviceableness, utility."

The meaning of the word "service" is thus given by the Century:—

> "A useful office; an advantage conferred or brought about; benefit or good performed, done, or caused; use; employment."

"Service" expressed the intent of Congress to include with the operating railroad all property used or employed for the benefit of that transportation effort.

If the phrases "in the service of transportation" and "for the purposes of a common carrier" are not accorded their ordinary meaning the result would be to render the statute of doubtful constitutionality. The order of the Commission directed that the coal produced in the Railway fuel mines should be turned over at bare cost. The District Court perceived that the effect of this feature of the order would be to

deprive the Railway Company of any return on its coal mining property and the Court indicated that the coal might be turned over at a profit. It is at once apparent that if the Commission was right in its conclusion that the coal mining property must not be classified as transportation property then the function of the Commission was at an end. The property then became like any other private property not devoted to public service or affected with public interest and it was altogether outside the power of the Commission to say whether the Railway should have on such property a profit or no profit. The District Court should have observed this necessary result of the Commission's attempted classification and should have indicated that that portion of the order was simply outside the Commission's power. But the District Court seems to have fallen in part at least into the error of the Commission. In suggesting that a profit might be charged on the railway fuel coal the Court also assumes to direct the Railway in a matter outside the statutory field.

But the truth is that both the Commission and the District Court have given the statutory phrases a construction outside their ordinary meaning, a construction which raises grave constitutional doubt that must be avoided: *Ann*

Arbor R. R. v. *U. S.*, 281 U. S. 658. The effect of the order is to exclude from Value for the rate base the Railway investment in its fuel property. The constitutional objection is not met, as the District Court may have thought, by the suggestion that the property may be operated at a separate profit, for in a recapture case (now pending against the Railway Company) the Railway fuel property may be excluded from the value upon which the possibility of recapture is to be based. Accounting under an order of the Commission is not a mere matter of form but one of substance. If the fuel mines of the Carrier are used in the service of transportation and for the purposes of a common carrier, then the carrier as a matter of law is entitled to a fair return on the value of such property. If the property is not used in the service of transportation and for the purposes of a common carrier allowance of a separate profit is beyond the power of the Court. True, the District Court in the case at Bar pointed out (52 F. (2d) at page 970) that orders which the Commission may make relative to accounting or reports which the Carriers may make to the Commission in compliance with such orders may be contested by "a carrier in any rate-making or recapture proceedings" if these orders accomplish "an improper classification of its property in arriving at the rate base."

Due process certainly requires a hearing. But the District Court went on to say (page 970):—

> "Accounting under the order of the commission is not a mere matter of form, but one of substance. It sets forth the condition of public carriers for the information of their stock and bondholders and the investing public as well as for that of the commission. It furnishes the basis of corporate financing, and many other matters affecting their very existence. They are entitled, therefore, not to be subjected to accounting orders which transcend the powers of the commission or which are arbitrary or unreasonable, and we have no doubt that, as against an accounting order which so offends, a carrier is entitled to relief by injunction. There is jurisdiction in equity, therefore, to entertain the suit which has been instituted."

The Commission lays stress on the word "used" contained in both Sections, 15a and 19a, and argued as follows in its brief to the District Court:—

> "The difficulty in making an exact definition of the word 'use' as it is found in the statute, has resulted in the accepted rule that imminence of use may be accepted as actual present use, and, of course, the exact definition of the word 'imminence' is also subject to argument."

The immediate answer to this argument is that the statute does not qualify use as imminent or otherwise. Rather the implication from the juxtaposition in those sections of the words "held for" and "owned" necessarily suggests an acquisition, holding and ownership substantially antecedent to use. It would seem the typical function of managerial discretion to determine in advance, and as far in advance as may be, upon acquisition of property necessary to the service of transportation and for the purposes of a common carrier.

The Commission and the District Court both lay a good deal of stress on the decision and authority of *Delaware, Lackawanna & Western R. R.* v. *Yurkonis*, 238 U. S. 439, and similar cases arising under the Federal Employers' Liability Act, to the effect that employment in coal mining is not employment in interstate commerce. The Court will recall that the Federal Employers' Liability Act applies by its terms and of necessity only to the employee of an interstate common carrier while "employed by such carrier in such commerce." The word "commerce" having the broadest significance of intercourse generally, as was observed in *Gibbons* v. *Ogden*, 9 Wheaton 1, 189, this Court has construed the word to mean "transportation" in the

context of a liability act passed for the protection of employees and for the safety of railroad operation and maintenance: *Chicago & Eastern Ill. Ry. Co.* v. *Industrial Accident Commission of Ill.*, 284 U. S. 296. But the definition of commerce as transportation in such a context throws no light on the problem of ascertaining the inclusions of property owned, held or used in the service of transportation and for the purposes of a common carrier. The only resemblance between definition of commerce as transportation in the *Yurkonis* case and the present problem is in the attractive chance circumstance that coal mining is the matter considered in each instance. The case of *Shanks* v. *D. L. & W. R. R. Co.*, 239 U. S. 556, another Federal Employers' Liability Act case, illustrates the absence of resemblance between the subject matters. Shanks was injured in the employment of taking down and putting into a new location an overhead counter shaft, through which power was communicated to some of the machinery used in a railroad repair shop. He was deemed by this Court not employed in interstate transportation. But as we have seen, railroad shops for manufacturing and repair of locomotives and cars are, according to the Commission, held for and used in the service of transportation. So the invocation of the *Yurkonis*

case and other Federal Employers' Liability Act cases as authority either proves too much or nothing at all as the *Shanks* case illustrates. For the purposes of Sections 15a and 19a, the word transportation, or rather the phrases "service of transportation" and "purposes of a common carrier" are evidently not used in the narrow sense of resultant railroad operation and maintenance as in the Federal Employers' Liability Act, but in the inclusive sense of all activities which serve to bring about the result of transportation and common carriage.

In BROGAN v. NATIONAL SURETY COMPANY, 246 U. S. 257, 260, (1918) a contractor's bond was sued upon for groceries and provisions to the value of $4,613.87 furnished to the contractor "in the prosecution of the work provided for in the contract" and "were necessary to and wholly consumed in such work."

The Court held that the supplies furnished by Brogan "were clearly used in the prosecution of the work, just as supplies furnished for the soldiers' mess are used in the prosecution of war;" and added that "In each case the relation of food to the work in hand is proximate." The work was regarded as one economic unit.

The Report of the Interstate Commerce Commission (171 I. C. C., page 568) expresses a

variant of this same idea that the mining of coal has usually been considered a distinct industry from that of a railroad. The emphasis laid in the Report on this feature is that the business of mining is local, subject to local taxation and regulation; and the point is stressed that the Railway Company "conforms to State laws with respect to the manner of mining and the relation of master and servant."

The employees engaged in transportation are, as to the relation of master and servant, regulated by State law unless engaged at the time of injury in interstate commerce (transportation). Much real estate used by the carriers in the service of transportation for general offices and the like is subject to local taxation. Tests of the application of local law applied by the Commission sometimes figure importantly in determining whether intra- or interstate commerce is being conducted. But these tests do not determine the scope of the service of transportation.

(d) *Dedication not decisive.*

A "line of railroad" cannot be abandoned without authority of the Interstate Commerce Commission: Section 1 (18)-(21) of the Interstate Commerce Act. A line of railroad is dedicated in the sense of the opinion of the District Court. But dedication is inconclusive. The locomotives

and cars that run on the line of railroad can be sold, exchanged or scrapped without authority of the Commission and are classified by the Commission as transportation property although they are not "dedicated." The line of railroad, the locomotives and cars, the signal systems, and all property held for and used in the service of transportation are in the same class for capital accounting, for valuation, recapture and rate-base, irrespective of dedication, formal or final.

See also (f), *infra,* page 22.

(f) *Power to Sell or Lease not Decisive.*

The District Court makes the accounting classification turn upon the power of the Carrier to lease or sell the particular property without the visé, of the Interstate Commerce Commission.

All agree that an office building, locomotives and cars are property held for and used in the service of transportation. And yet such units are sold at will and without the authority of the Interstate Commerce Commission.

See (d), *supra,* page 21.

(g) *Collieries legally different from Carrier-owned Power Plants, Gas Plants and Water Plants.*

The collieries produce coal which is then used for fuel in the service of transportation just as

the power plant produces electrical or other energy, the gas plant produces gas and the water plant produces water for locomotive or power boilers to convert into steam. All of these are with common approval classified as property held for and used in the service of transportation.

The Order of the Commission in the case at Bar gives controlling effect to the accounting theories or convenience of the Commission and disregards the peculiar facts established without controversy by the evidence of *holding* and *use* in the service of transportation.

The Commission in various cases has held that *use* is decisive:—

> TEXAS MIDLAND RAILROAD, 75 I. C. C. 1, 162;
>
> SAN PEDRO, LOS ANGELES & SALT LAKE R. R. CO., 75 I. C. C. 463, 498.

In these rulings the Commission followed this Court. Thus in SMYTH v. AMES, 169 U. S. 466, 547:—

> "What the Company is entitled to ask is a fair return upon the value of that which it *employs* for the public convenience." (Italics ours.)

In the MINNESOTA RATE CASES, 230 U. S. 352, 434, the Court said:—

> "The private property *embarked* in it" (public service) "is not placed at the mercy

> of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title, but to the right to receive just compensation for the service given to the public." (Italics ours.)

In SAN DIEGO LAND & TOWN CO. v. JASPER, 189 U. S. 439, 442, the Court said that there must be "a fair return upon the reasonable value of the property at the time it is being *used* for the public." (Italics ours.)

In SAN DIEGO LAND & TOWN CO. v. NATIONAL CITY, 174 U. S. 739, 757, the Court said:—

> "What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being *used* for the public." (Italics ours.)

(*B*) THE DISTRICT COURT ERRED IN SUSTAINING THE COMMISSION'S ORDER BECAUSE THE BILL LACKS EQUITY (ASSIGNMENT OF ERRORS I): THE FUEL COLLIERIES ARE NON-TRANSPORTATION PROPERTY (ASSIGNMENT OF ERRORS II): THE ORDER OF THE COMMISSION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE (ASSIGNMENT OF ERRORS III): AND THE ORDER OF THE COMMISSION WAS CONTRARY TO THE EVIDENCE (ASSIGNMENT OF ERRORS IV).

As to Assignment of Errors I the preceding arguments have covered this Assignment.

As to Assignment of Errors II the sub-head (*A*) *supra* of this argument covers also this Assignment.

Assignment of Errors III and IV (R. 315-316) are that the District Court erred in dismissing the bill and refusing an injunction "because the decision and order of the Commission classifying Petitioner's collieries as non-transportation properties was unsupported by substantial evidence." The evidence was uncontradicted that the collieries were acquired for and limited in use to the production of fuel coal; and that severance between coal for immediate mining and for reserve was impossible. The order was arbitrary and void in violation of the Fifth Amendment.

Argument is not here repeated of the legal problem of interfering with the acquisition of fuel coal, which is argued under (*A*) *supra*.

(*C*) THE DISTRICT COURT DECIDED THE CASE ON ERRONEOUS CONCEPTS AND THEORIES OF THE LAW:

(Assignments of Errors V)—(Sub-divisions (a), (h), (i) and (k)—and VI):—

The District Court erred in holding:—

(a) ***that the accounts must rest in the discretion of the Commission unless manifestly arbitrary and unreasonable:***

(k) *that even if the collieries ought logically to be classified as property used in the service of transportation nevertheless the classification out of such property would be fair and reasonable if so found by the Commission:*

(*Introductory.*) These two sub-divisions of Assignment V may conveniently be argued together as both present in slightly different form the extreme view of the Commission discretion as conclusive.

There is here, as the District Court observed, no dispute over the pertinent evidence: the Railway Company purchased and operated coal mines adjacent to its railroad for the sole purpose of supplying fuel for the service of transportation as a common carrier. The coal mines were acquired and operated for no other purpose and this is the controlling fact. In literal exactness, as we have seen, the mines are owned, held and used in the service of transportation and for the purposes of a common carrier, and for that alone. The mines are servants of the Railway—they "wait upon; supply the wants of" the Railway, to recall Webster's definition of the verb "to serve." The conclusion of the Commission that interpretation of the word "use" or the substituted phrase "imminence of use" is within

final administrative discretion of the Commission implies admission that the Railway fuel mines are in fact owned, held and used in the service of transportation and for the purposes of a common carrier. The admission seems inevitable, for the record shows no dispute of pertinent fact. The Commission, however, asserts jurisdiction to exclude property so used if in its administrative opinion the prospect of use is not sufficiently imminent or immediate.

Perhaps the error of the District Court comes from limiting the right of judicial review to manifest arbitrariness and unreasonableness as a result of concurrence in the preliminary conclusion of the Commission that the determination of classification lies finally in the administrative discretion of the Commission. Certainly the interpretation of the words of a statute and the application of them to admitted facts is a typical judicial function.

The claim is of final (administrative) authority to determine the meaning of the words in the statute.

In GREAT NORTHERN RAILWAY v. MERCHANTS ELEVATOR COMPANY, 259 U. S. 285, wherein the Court said (294):—

> "The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to

> apply that meaning to the undisputed facts. That operation was solely one of construction."

And at page 290:—

> "Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law."

There is no testimony tending to establish that the words of the statute were used in any other than their ordinary meaning or were used in peculiar meaning or technically.

So we pass to the Assignments lettered (*a*) and (*k*).

(*a*) The District Court in this Assignment ruled that the items for allocation under particular sub-divisions of the accounts "are obviously matters which must rest in the discretion of the Commission"; and that the Courts will not interfere "unless such exercise is so manifestly arbitrary and unreasonable as to transcend the Commission's powers."

Orders of the Commission may be arbitrary and unreasonable as (*a*) applied to the facts in evidence or (*b*) in their practical effect upon the property of this carrier and a reasonable return thereon, and yet may not be "manifestly" arbi-

trary and unreasonable considering only the face of the Order. This Court has not permitted the divorce of the law from the facts. The law is thus prevented from becoming a mere abstraction. Speaking of the Common Law Mr. Justice Holmes once explained that body of principles negatively as not "a brooding omnipresence in the sky." An illustration will make the point. In CHICAGO BOARD OF TRADE v. UNITED STATES, 246 U. S. 231, a rule of the Grain Board, intended to prohibit purchasing or offering to purchase in the period between the close of the "Call" and the opening of the session on the next business day, was under review. In upholding the "Call" rule this Court said (238):—

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

This Court said in the KANSAS CITY SOUTHERN CASE, 231 U. S. 423 (450):—

> "The accounting regulations do not seek to control railroad companies in the exercise of their discretion respecting what shall be done and how it shall be done, but only to systematize their accounts with respect to whatever is done."

Disregarding the relevant and peculiar facts that the collieries were purchased for and limited to and used exclusively for coal for locomotives and the creation of carrier power, the Order of the Commission has denied the effect of those facts. Thus coal mines purchased for and limited by the estate acquired to the fuel supply for transportation alone have been wrenched by the Commission's Order from the service of transportation and excluded from the accounts for that service.

So the Carrier will not be allowed to include the present value of the collieries ($2,650,467.28) in its valuation for rates, for recapture, for securities issues and for other like purposes under the Interstate Commerce Act.

(*k*) How can a classification be reasonable if illogical, merely because a Commission deems it reasonable? Logical, rational, reasonable are synonyms. If a classification is illogical it

cannot accord with reason. There is self-contradiction in the mere statement. And this mental operation denies due process. This is an essential of liberty under law and runs back to definite expression in The Great Charter. In BONHAM'S CASE (1609), 8 Coke, 113b, 118a, Lord Coke observed that even "an Act of Parliament" is void which "is against common right and reason."

A tribunal may "listen" to the proofs and argument, but it must also "give legal effect to what has been established," FAIRCHILD CASE, 224 U. S. 510, 525. A due process hearing calls for the two functions—listening and giving effect. Expressions in the Report of the Commission show that it was seeking a practical result and closed the mind to the peculiar facts established: see Report of the Commission, 171 I. C. C. 557 (567):—

> "However, since the record shows that the investment in mining rights is not susceptible of segregation between present needs and future reserves, and practical considerations require that the classification of the investment therein be likewise applied to the facilities used in mining, it seems that both should be so classified as to exclude them from the rate base."

The hearing by the Commission was not due process and the injunction should have gone

(apart from other legal reasons) to insure at a further hearing the application of the law to the peculiar facts established by the evidence. For this error this Court might reverse without defining with final exactitude for all conceivable cases the phrase "held for and used in the service of transportation."

The District Court adopted and emphasized this error in holding that even if the collieries ought logically to be classified as property used in the service of transportation, nevertheless the classification out of such property would be fair and reasonable if so found by the Commission; and so the Court abandoned jurisdiction of this question of law to the Commission.

The District Court erred in holding:—

(h) *that the classification of the collieries may "rest upon the customs and practices of carriers rather than upon logical formulas or analytical reasoning with reference to use.":*

(i) *that the classification of the collieries as non-transportation property was justified by the fact that most railroads have no coal mines and that the classification would not mean for comparative purposes of the Commission, the same thing as to all railroads:*

(*h*) A logical rule or formula is required by this Court of the Commission. Thus in the BEAUMONT CASE, 282 U. S. 74, this Court said (87):

> "The proceedings before the Commission were for the determination of what divisions are and for the future will be reasonable. Here the issue is whether the Commission's amended determinations and the order based on them are valid. Appellants are not estopped from assailing the averages or groups adopted. A sound basis for the rule or formula prescribing the divisions is essential to compliance with the Act."

The fifth point of the syllabus in BALTIMORE & OHIO RAILROAD COMPANY v. UNITED STATES, 277 U. S. 291, is apt to this Assignment of Error:

> "5. Proof of a practice among carriers whereby the delivering carrier bears the cost of switching when interchange is effected by means of an intermediate carrier, did not tend to prove that the arrangement complained of in this case was unjust or unreasonable. P. 301."

Again, in LOUISVILLE & NASHVILLE RAILROAD COMPANY v. UNITED STATES, 282 U. S. 740, the sixth point of the syllabus is this:—

> "(6) The Act being thus free from ambiguity, it can not be construed as per-

> mitting the practice merely because the practice has been in good faith, pursued by the carriers since a time antedating the Act, without correction by the Commission or by Congress. *Id.*" P. 757.

If the customs and practices of the carriers rather than a logical rule or formula, that is, rational processes, are to prevail, there will arise a disregard of the limit which this Court has set upon the power of the Commission to prescribe fair and reasonable accounting and any illogical, arbitrary or irrational practice may pull the accounting awry.

In KANSAS CITY SOUTHERN RAILWAY COMPANY v. UNITED STATES, 231 U. S. 423 (456), this Court declared that the power of the Commission is subject always to the limitation that the Commission must act "fairly and *reasonably* within the grant of power constitutionally conferred by Congress." (Italics ours.)

(*i*) (This also covers the kindred Assignment of Error VI).

If this ruling based on uniformity of carrier property was erroneous the error is of law.

In result the Commission's Order requires uniformity of property for carrier accounting, not a uniform system of accounts under which all

the property of all the carriers can be appropriately distributed. An error of law by the Commission which induces an incorrect ruling on conceded facts is subject to injunction, as in the Uniform Mileage Rate Ticket Case; UNITED STATES v. NEW YORK CENTRAL R. R., 263 U. S. 603.

Assistant Director Barnes of the Bureau of Accounts stated that "the prime test of all is" the effect on the accounts for comparative purposes and uniformity and that this "is the real test" (R. 212-213). The Commission in contriving the Order was actuated by a misconception of the decisive legal principles and did not give effect to the law and peculiar facts established by the evidence: See WASHINGTON v. FAIRCHILD, 224 U. S. 510, 525, thus:—

> "The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established."

In CROWELL v. BENSON, 285 U. S. 22, this Court said (60):

> "In cases brought to enforce constitutional rights, the judicial power of the United

> States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to 'a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts.' "

As Circuit Judge Parker observed, there is no dispute of fact in the evidence before the Commission in the case at Bar and no necessity for this Court to determine the facts for itself on conflicting evidence. But the Commission refused to give legal effect to the facts established by the evidence.

The opinion of the District Court brought into review under this Assignment is as follows (R. 313):—

> "The fact that most railroads own no coal mines, that the Commission for years has followed the policy of classifying such mines as non-transportation property, and that all roads, even complainant itself, have followed the classification, is sufficient reason for continuing it. Unless the classifications prescribed are such that transportation property

> means practically the same thing with reference to the property of any carrier to which the classification may be applied, the reports to the Commission will have little value, and it will be without the information necessary to enable it to perform the important duties required of it by Congress. Even if we thought, therefore, that the mines here in question ought logically to be classified under transportation property, 'we still should not deem this a sufficient ground to declare that the Commission had abused its power.' "

The comment of the District Court "that most railroads own no coal mines" overlooks a primary feature in this case; that we are here dealing not with mine ownership in general but with mines used *exclusively in the service of transportation.*

The District Court thus ruled that the classification prescribed must be "such that transportation property means practically the same thing with reference to the property of *any carrier* to which the classification may be applied": (Italics ours). A carrier having fuel mines will not be permitted to carry them in accounts of property for the service of transportation because that carrier's accounts will not mean "practically the same thing" as the accounts of other carriers not holding and using such mines.

By the same token there ought to be no account of property held for and used in the service of transportation for electric power transmission property, or an electric power plant, because relatively few interstate carriers operate by electricity. And if presently all the railroads acquired fuel mines, then the objection would be avoided; and *without any alteration of the holding and use,* the Norfolk and Western mines would, in the twinkling of an eye, appear in the capital account for the service of transportation!

(*D*) THE DISTRICT COURT ERRED IN REFUSING TO ENJOIN THE COMMISSION'S ORDER:—

(Assignments of Errors VII and VIII.)

(*a*) As invading the field of managerial discretion.

(Assignment of Errors VII.)

For the first nine months of the year of hearing (1928) these collieries produced 1,062,705 tons of coal, which was 48% of the Carrier's total fuel requirements. The total fuel requirements were in excess of 2,000,000 tons for that year. The contract price of coal for that year averaged $1.6474 a ton. So the fuel supply for that coal year cost upwards of $3,000,000. The net capital

investment in the mines as of September 30, 1928, was $2,650,467.28, or less in money than the cost of one year's fuel supply.

How was the managerial discretion exercised in the case at bar?

Here are the extracts from the testimony which were in substance adopted in the Report of the Commission (R. 134):—

> "At the time the properties were purchased the coal market was again in a peculiar position, but in the reverse direction. The market prices of coal were soaring; it was greatly in demand; we were confronted with conditions of car shortages; we were confronted with difficulty in obtaining regular supplies of coal, even after purchasing.
>
> "During the years when these coal properties were acquired, it was rather difficult to obtain a suitable amount of fuel coal at reasonable prices for a year or more prior to and several years subsequent to the purchase of our coal properties. We also had considerable difficulty in getting deliveries of coal due to car shortages, extreme demand of the coal market and rapidly rising prices which induced shippers to take advantage of high prices rather than the fuel contract prices. I do not want to charge shippers with (fol. 152) breaking contracts but we had difficulty in getting the coal. We often found it necessary to confiscate coal amounting to hundreds of thousands of dollars in

order to get sufficient amount to operate the railroad.

"In addition to the financial savings to the company by reason of the ownership and operation of these mines we are able to purchase coal more cheaply in the commercial market. We are able to keep in close touch with production costs and with the coal situation generally, thus obtaining an advantage in the placing of contracts and the purchase of fuel. It is also known in the coal fields that we could quite materially increase our production and could, therefore, obtain those savings in event we felt we were not purchasing our coal at reasonable prices."

This discretion under the circumstances presented to the Management couldn't be exercised by segregating the collieries into the facilities and enough coal for a day or a week and other coal to be mined as reached. Here is the controlling evidence on segregation, also adopted by the Commission's Report (R. 176):—

"As to whether or not there might be a theoretical division of the property on a percentage basis, setting off a certain percentage of the coal for immediate use for carrier classification as against the remaining percentage for a non-carrier classification, I do not see how it would be practicable to so divide the property and allocate a certain

part of it as carrier and the remaining part as non-carrier. All of the property is in active use and to some extent under development. None of it is held as reserve beyond the normal economic life of property considered as in actual operation or under actual development. Therefore, under the conditions, I do not think any of the property should be considered as far enough beyond the point of actual development to be considered reserve or in a separate classification. It is my opinion that all of the coal rights of the company at the three mining properties regarding the operations from the standpoint of the actual physical production of coal as well as the accounting problems could not be segregated into two classes. They are all either carrier property under active development or non-carrier property under active development."

The three fuel collieries of the Railway Company are the Howard, Vulcan, and Pond Creek.

The gross capital investment for Howard was $2,208,154.29, of which $1,348,794.35 was for the mine and the balance, $859,359.94, for the mine plant and equipment used in connection with the mine: Exhibit 50 (R. 107).

For the Vulcan the same figures are gross capital investment $562,637.12, of which coal lands and mine development were $179,712.48 and the

mine plant and equipment $382,924.64: Exhibit 51 (R. 108).

And the same figures for Pond Creek are coal lands $220,829.84 and gross capital investment $890,245.22, giving for the mine plant $669,415.38: Exhibit 52 (R. 109).

The foregoing figures are subject to Depreciation and Depletion.

Thus it is seen that the evidence discloses that the mine facilities, as distinguished from the right to mine or the leases cost $1,911,699.96 and the rights to mine the coal cost $1,749,336.67.

The managerial discretion was exercised in the acquisition of these properties and facilities to spread the cost of the facilities over an economic tonnage of coal to be mined. There is no dispute about this in the evidence.

Now comes the Commission with the substitution of its judgment, after the fact, for the managerial discretion of the Carrier. How completely the Commission has substituted its judgment (without evidential support) for the managerial discretion will appear from this quotation from the Commission's Report (R. 24):—

> "Before including in the rate base property held for future use it is proper to inquire why its acquisition can not be postponed until it is needed. If suitable mining rights can be obtained when required

> at not to exceed the necessary present outlay plus proper carrying charges, there is no occasion to purchase them in advance. Generally speaking, the only measurable advantage to be gained from purchasing substantially in advance of railway needs must depend upon the price paid at which the rights are obtainable as compared with prices likely to prevail during the period of exhaustion of the coal deposit; although it is recognized that from the standpoint of colliery operation it may not only be desirable but necessary to provide reasonable assurance of spreading the unsalvageable cost of the necessary machinery and equipment over a substantial tonnage in an economical manner."

This Court said in KANSAS CITY SOUTHERN RAILWAY v. UNITED STATES, 231 U. S. 423, 450:—

> "The accounting regulations do not seek to control railroad companies in the exercise of their discretion respecting what shall be done and how it shall be done, but only to systematize their accounts with respect to whatever is done."

In PACIFIC TELEPHONE & TELEGRAPH CO. v. WHITCOMB, 12 F. (2d) 279, the suit was for injunction against the Director of Public Works of the State of Washington alleging that rate

orders promulgated by the Department were confiscatory. A permanent injunction was granted by a statutory three-Judge Federal Court. Investments for future needs (telephone switching machine apparatus) of the Telephone Company were allowed by the Master and this was approved by the District Court, saying (288):—

> "Public service companies cannot wait until their facilities break down or prove unequal to the demands upon them before making needful additions and improvements. Business judgment must be employed to anticipate reasonable future needs and to make provision for them in advance. This is essentially a matter of business management which may not be arbitrarily interfered with. There is nothing in the outlay to suggest dishonest, wasteful, or imprudent expenditure. The right of a public utility corporation honestly and in good faith to carry on its business and direct its affairs must not be wrested from it under the guise of rate making. In the absence of evidence to the contrary, investments may reasonably be assumed to have been made in the exercise of reasonable judgment."

In the case of In The Matter of the APPLICATION OF THE CITY OF MONTREAL for a reduction in the rates of the Bell Telephone Company, 13 American Tel. & Tel. Company Commerce Leaf-

lets, 93, decided October 28, 1912 (commented upon in Whitten-Wilcox, Valuation of Public Service Corporation, Vol. 1, p. 861), the Board of Railway Commissioners of Canada said:—

> "There is no question that preparation for future needs is one of the incidents of the proper management of a public utility corporation. If it is to allow demands for service to pile up and then make an expansion only after the urgency is sufficiently great, the public will be subjected to the disadvantage of delay in obtaining service, and at the same time the piecemeal method of construction this will necessitate will undoubtedly add to the cost of the plant. A comprehensive system of preparation for future needs must be followed if there is to be proper expansion."

In DENVER UNION STOCK YARD CO. v. UNITED STATES, 57 Fed. (2d) 735 (District Court of Colorado, April 4, 1932), the Secretary of Agriculture, after hearing, had made an order reducing the rates of the Stock Yard Company. His authority was the Packers and Stockyards Act of 1921, Section 316 (7 U. S. C. A., Section 217), giving to the Secretary of Agriculture the same authority possessed by the Interstate Commerce Commission. The Secretary had excluded from the value for determining the con-

stitutionality of the rate regulation vacant land acquired for later expansion. The Secretary found that it was sound business judgment to acquire this adjacent real estate while it was cheap and unimproved, but he excluded the land from valuation until brought into use as a result of the additional expected business and he pointed out that the rates charged for the services will then compensate for the use of the vacant land at the time it is brought into use.

In granting an injunction for this error (among others) the Court said (747):—

> "The rule undoubtedly is and must be that the power to regulate rates does not confer upon the Secretary the power of management of the affairs of the corporation. In providing for telephone facilities to a new addition, it is the part of wisdom to lay a cable that will provide services for customers that may reasonably be expected to be attached in the future; in constructing office buildings, school buildings, and federal buildings, public authorities deliberately plan such buildings to accommodate the anticipated needs of the future. To do otherwise is to be shórt-sighted and wasteful. There is no rule of law that denies to the directors of a stock-yards company or of a telephone company the right to use ordinary business judgment in the conduct of the affairs of the corpora-

tion. The rule of law adopted by the Secretary would deny to a telephone company the right to include in its rate base the value of any cable that was laid, unless every wire in the cable was in actual service; it would deny to an electric power company the right to include in the rate base the value of the power plant, unless it was being operated to its maximum capacity. Such a rule does not conform to sound business methods, nor to the rules of law as laid down by the courts."

And again (748):—

"These cases do no more than to apply the rule long settled that the power to regulate rates does not confer the power to manage. In State of Missouri *ex rel* Southwestern Bell Telephone Co. *v.* Pub. Serv. Comm., 262 U. S. 276, at page 288, 43 S. Ct. 544, 547, 67 L. Ed. 981, 31 A. L. R. 807, the Supreme Court said: 'There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors has exercised a proper discretion about this matter requiring business judgment. It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership."

(*b*) As invading the legal right of the Railway Company to have and use fair and reasonable accounting for its property.

(Assignment of Errors VIII.)

The practical significance of the Commission's Order may be readily illustrated. Counsel for the Interstate Commerce Commission in his Brief in the Court below explained that the effect of the Order was to exclude the fuel collieries from the Carrier's rate base, that is from the transportation capital. Indeed this was a purpose of the Order. These collieries are and must by title limitation be used solely to produce coal for locomotives and carrier power. If excluded from the property held for and used in the service of transportation, then under Section 20a (2) the Commission will also refuse to find that the approval of a securities issue based in whole or in part upon the collieries "(*a*) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance *by the carrier of service* to the public as a common carrier, and which will not impair its ability to perform that service, and (*b*) is reasonably necessary and appropriate for such purpose:" (Italics ours.) And for other purposes of constitutional value, such as

the rate-base, the property would be similarly excluded.

The Order would deny the constitutional rights of the Carrier to a current value and a reasonable return in the rate structure: the BALTIMORE TRACTION CASE, 280 U. S. 234. The Fifth Amendment limits all regulations of interstate commerce: ADAIR v. UNITED STATES, 208 U. S. 161.

(*E*) THE CONCLUSIONS EXAMINED OF THE INTERSTATE COMMERCE COMMISSION.

In the Report of the Commission in the case at Bar (171 I. C. C. 557) the grounds are set forth, covering sixteen printed pages. The District Court adopted some of these grounds as the basis of the decision now under review. Our argument covers these common grounds. We shall conclude with an examination of the grounds stated by the Commission not already covered in the argument.

(i)

The Commission's Theory of "Permanence."

The Report (R. 22) opens the discussion of the problem by drawing a distinction between "a water right" (classified by the Commission as transportation property,) as "a thing of more or less perma-

nence, as the supply is ordinarily replenished by nature" and the right to take coal, which is declared to be "not of a permanent nature because the exercise thereof results in its extinction."

The bearings, brake shoes, wheels and other wearing parts of a locomotive are worn out by use and the locomotive itself at last is worn out and scrapped. Ties decay; rails are ground down by traffic and ultimately worn out. The same is true in measure of a wide variety of property carried by a railroad in capital account and charged to transportation. Its use results in its extinction. But the Commission has never suggested that this lack of permanence of the property unit of a locomotive or in fact these other items should exclude the value from Account 701—Investment in Road and Equipment.

(ii)

Collieries excluded as not "Working Capital."

The Report declares that (R. 23) "coal supplies enter the rate base under the element of working capital in the form of a necessary investment in material and supplies and are not considered as being in use prior to their entry into that account"; and that "in the case of fuel the normal and reason-

able requirements for a carrier situated as is the petitioner would not be in excess of a few weeks' supply."

This would apply the practice of carriers buying their fuel coal to a carrier that has acquired and uses mines for that purpose. The accounting for other differently situated carriers must control the carriers in the status of the Norfolk and Western, according to the Report.

The determination of Working Capital has no relation to the problem of correct capital accounting for the mines producing fuel coal. The collieries like an electric power plant are unrelated to working capital.

(iii)

Advantage or disadvantage immaterial in determining use.

The Report (R. 24) goes into the relative advantages and disadvantages of providing coal mines for fuel. This part of the Report reads:

> "If the price level remains the same or decreases, the investment will have proved to be improvident, while if the price level advances, the investment turns out to be a prudent one. In any event the question arises whether the charges to operating expenses with respect to the coal should reflect the

> cost of mining rights at the new or original level. Manifestly, if the rate payers are to be burdened by carrying an unwise investment they should be in a position to obtain the advantage of a prudent one. But this can not be accomplished if the coal for future needs is carried in the rate base because in such case the carrier only is in a position to profit by the advance purchase."

The determination of advantage or disadvantage is in the sphere of managerial discretion. If the collieries are in law held for and used in the service of transportation the wisdom of the investment is not for the Commission to control directly or, under the guise of accounting regulations, indirectly.

(iv)

As collieries cannot be divided the Report declares that all must go under non-transportation property.

The Report asserts (R. 26) that "the record shows that the investment in mining rights is not susceptible of segregation between present needs and future reserves, and practical considerations require that the classification of the investment therein be likewise applied to the facilities used in mining, it seems that both should be so classified as to exclude them from the rate base."

Why? If they can't be segregated the whole should be classified by the use, present and prospective. The Commission's remedy as to both parts is "to exclude them from the rate base"—*i. e.,* an alleged complexity in book-keeping is a ground for an arbitrary deprivation of property.

(v)

No analogy of output-contract mines to owned mines.

The Report (R. 30) asserts that "output-contract mines" are in the same category as mines owned by a carrier and used for fuel purposes. Here is the argument of the Report on this point:—

> "Since use rather than ownership is recognized as the test of whether property is carrier or non-carrier, the reach and consequence of the classification sought by the petitioner also furnish a cogent argument against its propriety."

No suggestion had been made by the Railway Company at any stage of this case that there can be use of a property for the service of transportation unless that property is in carrier ownership (owned outright or leased). There has been no claim that mines of coal operators from which

the entire output is bought by the Railway Company are held for the service of transportation. Such output mines could not be a part of the Investment Account, carrier or non-carrier.

So the Report is straining to apply a supposed analogy and ascribes to the Carrier here the view that "use rather than ownership is recognized as the test." Under the statute use and ownership (holding) must unite, the Railway Company suggests.

(vi)

Power to condemn no test of use.

The last postulate advanced in the Report (R. 30-31) is on the faith of a Vermont case, holding that a railroad company could not condemn for shops.

The condemnation statutes of the States may include in or exclude from the power of eminent domain the supporting activities of a railroad company. Vermont had not included railroad shops in that power. The reference to the Vermont case shows the Commission confusing the fortuitous grant of eminent domain with the service of transportation. If the power of condemnation were not granted for any purpose or were withdrawn the property held for and used in the service of transportation would by con-

stitutional right continue to be carried in the appropriate capital Investment Account for such property.

Respectfully submitted,

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SEPTEMBER 16, 1932.

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No. 18

In the Supreme Court of the United States

OCTOBER TERM, 1932

NORFOLK & WESTERN RAILWAY COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINION BELOW

The opinion of the specially constituted District Court (R. 305) is reported in 52 F. (2d) 967. The report of the Interstate Commerce Commission (R. 13) is reported in 171 I. C. C. 557.

JURISDICTION

The final decree of the District Court was entered October 15, 1931. (R. 304.) Petition for ap-

peal was filed November 14, 1931, and was allowed November 18, 1931. (R. 314, 320.) The jurisdiction of this Court rests on the Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U. S. C., Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

I. Whether the order of the Interstate Commerce Commission requiring appellant to classify as nontransportation property its investment in coal mines, the output of which it used for railroad fuel, was a valid and reasonable exercise of the powers conferred upon the Commission by Section 20 of the Interstate Commerce Act.

II. Whether coal mining property and leaseholds acquired and used by appellant for supplying a part of its present and future fuel requirements is property devoted to transportation service.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 25–27.

STATEMENT

This is a suit, instituted by the Norfolk & Western Railway Company against the United States and the Interstate Commerce Commission, to enjoin the enforcement of an order of the Commission dated January 5, 1931 (R. 33), which pre-

scribed the manner in which appellant should set up in its accounts certain investments which it has in coal mines, the production of which is used to supply a part of its fuel needs.

Appellant's mining interests are in three collieries, *viz*, the Howard, the Vulcan, and the Pond Creek. (R. 43.) Its interests in Howard Collieries and the Vulcan Colliery were acquired in 1917, and in the Pond Creek Colliery in 1920. (R. 43.) All of these mines are located in West Virginia. The Howard Collieries are located on a short branch line of appellant connecting with its main line at Chattaroy, West Virginia, and consist of 2,875 acres of land, fee title to which was taken by the Pocahontas Coal & Coke Company, a subsidiary of appellant, appellant itself being entitled to the mining rights, royalties being prepaid. (R. 43, 112.) In addition, so-called leases were made in 1924 and 1925 covering adjacent lands (R. 43), the total acreage being about 5,350 acres. It was estimated at the time of the acquisitions that approximately 30,650,000 tons of recoverable coal were available from the Howard Collieries. (R. 51.)

The Vulcan Colliery is located on appellant's main line at Vulcan, West Virginia, and consists of about nine hundred acres. (R. 43–44.) It was estimated that the aggregate amount of recoverable coal from this source was 4,953,000 tons, including that available from subsequently acquired sources. (R. 51.) The Pond Creek Colliery is located at

Williamson, West Virginia, adjacent to the terminal yards, and includes, with additions, about 2,900 acres. (R. 43, 44.) It was estimated that the recoverable coal from this colliery was 17,500,000 tons. (R. 51.) Appellant owns outright only the coal underlying the original Howard Collieries acquisition, consisting of 2,875 acres, the remaining 6,300 acres being covered by royalty leases, under which the coal does not become the carrier's property until mined and paid for. (R. 18, 112.)

The total tonnage of all these properties was estimated at 53,103,000 tons. On September 30, 1928, 8,476,058 tons had been mined from the three properties, consisting of Howard, 4,645,062; Vulcan, 1,746,779; Pond Creek, 2,084,217. (R. 51–52.) It was estimated that, under normal conditions of production, the supply of coal from the Howard Collieries would not be exhausted until the lapse of thirty-three years (from the year 1928), the estimates as to the Vulcan and Pond Creek collieries being, respectively, seventeen and thirty-five years. (R. 123, 124.)

The entire output of these mines is consumed by appellant in its operations. (R. 48.) Appellant's average yearly fuel requirement is about 3,250,000 tons, and about 48% of its requirements were supplied by these collieries in the first nine months of 1928. (R. 18; Ex. 6, R. 50A.)

Appellant's net capital investment in the three collieries as of September 30, 1928, was $2,650,467.28. (Ex. 4, R. 46A.) The details as to the acquisition

costs of the three collieries are shown in Exs. 50, 51, and 52. (R. 107–109.) The gross capital investment in the Howard Collieries was $1,480,665.31. (Ex. 50, R. 107.) Of this, appellant allocated $900,000 to mining rights, $224,775.15 to mine development, and the balance to mine plant and equipment. (R. 112, 114; Ex. 50, R. 107.) The total investment includes a payment by the carrier of $250,000 made to secure cancellation of a prior lease. (R. 113, 115.) Royalties of 20¢ per ton are paid to the lessee on each ton of coal mined. (R. 113.) No part of the acquisition cost of the Vulcan Colliery was allocated to "Mining Rights" or " Leaseholds." (Ex. 51, R. 108.) An item of $152,670.09 was specified as the acquisition cost of leaseholds in the Pond Creek Colliery. (Ex. 52, R. 109.) The total Pond Creek investment was $329,546.22. (Ex. 4, R. 46A.) Of this amount $300,000 was the cost of acquiring the stock of a corporation previously operating the mines, but the leasehold value was arrived at by deducting from the total acquisition cost the appraised values of the physical properties. (R. 90, 118, 121.)

Since the opening transaction appellant has carried these mining investments in its accounts under "Balance Sheet Account 705," relating to investment in miscellaneous physical property . (R. 18.) On August 3, 1927, it addressed a letter to the Commission's Bureau of Accounts asking that it be permitted to transfer the investment in these col-

lieries from Account 705 to Account 701, "Investment in Road and Equipment." (Def. Ex. 1, R. 296.) The Commission took this request under consideration, and on January 14, 1928, entered an *ex parte* order directing that the investment be continued under Account 705. (R. 14.) Appellant, after notification of this action, filed with the Commission a petition asking for a hearing on the subject, which was granted by a supplemental order of the Commission dated July 24, 1928. (Def. Exs. 3, 5, R. 300, 303.) By this order the Commission suspended its order of January 14, 1928, and assigned the matter for hearing. After a full hearing the Commission issued a report and its final order of January 5, 1931, which is involved in this proceeding.

SUMMARY OF ARGUMENT

I. The Commission's order required appellant to enter its mining investments in its accounts as non-transportation property, to account for the attendant revenues and expenses as arising from miscellaneous operations, and to charge to its railway operating expenses the average monthly production cost per ton of coal produced in the collieries for consumption in appellant's transportation operations. Wholly apart from the technical question whether appellant's mines are used for transportation service, the Commission's order must be sustained as a reasonable exercise of its powers under

Section 20 of the Act. The sole effect of the Commission's order is to require appellant to keep its accounts in the prescribed manner. There is nothing in the order or in the Act which makes the Commission's determination that these mines are not transportation properties final for rate-making purposes.

The Commission's order and pertinent classifications tended to preserve uniformity in carrier accounts generally, which was one of the principal objects sought by Section 20 of the Act. Furthermore, the order did not deprive appellant of an opportunity to earn a return on its investment in the collieries. Appellant may claim as a part of the cost of the coal produced allowances for depletion, depreciation, and carrying charges on the investment. Appellant offers no valid reason for disturbing the noncarrier classification of mining properties consented to by it and other carriers over a period of many years.

II. Analysis of the essential character of appellant's mining operations requires the classification of its investment as nontransportation. The business of mining coal is entirely separate from that of transportation. The mere fact that the mines supply a needed facility does not stamp them as transportation properties. The manufacture of rails, ties, and cars for carrier use provides needed facilities, yet it could hardly be contended that these

are common carrier activities. Such activities naturally invite private enterprise and need not be engaged in by carriers.

The mining properties are not devoted to the public use as are the carrier's lines and usual facilities. Since Section 20 of the Act was designed principally to inform the Commission as to matters within its regulatory power, it is reasonable that properties not devoted to public use and subject to regulation should be separately classified. The business of mining, moreover, is not commerce and can therefore hardly be regarded as constituting transportation.

If the mines are not treated as property but as a supply of consumable coal, as suggested by appellant in the court below, the Commission's order denying a carrier classification is likewise justified. Applicable valuation decisions do not support the inclusion in the rate base of property not used and for which there is no imminent need.

If appellant's mining operations have yielded savings, this is not relevant in the determination of the proper classification of mines. Its estimate as to the amount of savings is excessive. In view of the more reasonable distribution of carrying charges which would result, a noncarrier classification is in the public interest.

ARGUMENT

I

THE COMMISSION'S ORDER WAS A VALID AND REASONABLE EXERCISE OF THE POWER CONFERRED BY SECTION 20 OF THE INTERSTATE COMMERCE ACT

The Commission's order, dated January 5, 1931, required appellant to carry its mining investment in its accounts under Balance Sheet Account 705, entitled "Miscellaneous Physical Property," and further required it to record the revenues received and expenses incurred and taxes paid under the form of accounts relating to miscellaneous operations. (R. 34–35.) The order provided further that the coal produced in the collieries for consumption in appellant's transportation operations should be charged to its railway operating expenses, under account No. 716, entitled "Material and Supplies," upon the basis of the average monthly production cost per ton. Provision was made for the furnishing by appellant of detailed monthly statements showing tonnage of each of the grades, kinds, and sizes of coal produced in each colliery, the cost per ton of each, and the comparable market prices of coal purchased by it from outside sources during the same period. Appellant contends that the order of the Commission was unlawful and had the effect of excluding from its rate base, upon which rates might be fixed or recapture determined, property devoted to transportation service. It was not alleged in the petition that the uniform accounts prescribed by the

Commission were unlawful, although the order was based upon an accounting classification prescribed by the Commission in an order of May 19, 1914 (R. 310), which classified coal mines as miscellaneous physical property.[1]

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[1] The pertinent provisions relating to the classification of properties are:

1. *Accounts for Investment in Road and Equipment.*—The accounts prescribed in this classification are designed to show the investment of the carrier in property devoted to transportation service. The carrier's investment in physical property other than transportation property is provided for in balance-sheet account No. 705, "Miscellaneous physical property." *The carrier* means the accounting carrier, except when otherwise specifically indicated. * * *. ("Classification of Investment in Road and Equipment of Steam Roads," July 1, 1914, "General Instructions," p. 9.) (See R. 20.)

701. *Investment in Road and Equipment.*—This account shall include the accounting company's investment in road and equipment (including that held under contract for purchase) in existence at the date of the balance sheet. * * *. (R. 19.) (See "Classification of Income, Profit and Loss, and General Balance Sheet Accounts," July 1, 1914, p. 43.)

705. *Miscellaneous Physical Property.*—This account shall include the accounting company's investments in physical property other than transportation property assignable to accounts Nos. 701 and 702, including hotels, restaurants, commercial power plants, etc., which are entirely distinct from transportation property and are not operated in connection with the transportation service of the accounting company.

Items of Investment: Coal and other mines, Commercial power plants, Hotels and restaurants, Lands and buildings not used in transportation operations, Lands and other property acquired and held in anticipation of future use, Mineral and timber lands, Rails and other track materials leased to others, Sawmills and other manufacturing plants not operated in connection with transportation service. (R. 279.) (See *ibid*, p. 44.)

The Commission's power to enter the order rests on Section 20 of the Interstate Commerce Act. Section 20 (5) of that Act provides that the Commission may prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of the Act, including those relating to the movement of traffic and to the receipts and expenditures of money. (*Infra,* pp. 26–27.) Section 20 (6) provides penalties for failure to keep such accounts, etc., in the manner prescribed by the Commission. (*Infra,* p. 27.) Appellant suggests that the validity of the order must be considered also in relation to the provisions of Sections 15a and 19a of the Act. Section 15a (2) authorizes the Commission to initiate, establish, or adjust rates so that carriers as a whole will earn, as nearly as may be, an aggregate annual net railway operating income equal to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. (*Infra,* p. 25.) Other paragraphs of that section provide for the recapture of funds earned by carriers in excess of a fair return. Section 19 a (a) provides that the Commission shall ascertain and report the value of all the property owned or used by every common carrier subject to the Act, shall list the properties subject thereto and show their values in the manner provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed

by the Commission. (*Infra,* p. 26.) Provision is made for the determination of the original cost and reproduction cost of property owned or used by the carrier for its purposes as a common carrier.

It is apparent that the sole effect of the Commission's order here is to require appellant to keep its books of account in accordance with the provisions of the order. There is nothing in the Commission's order, or in the Interstate Commerce Act, which makes the Commission's accounting determination that the mines are not transportation properties final for rate-making purposes. Appellant is left free in any rate or recapture proceeding to contend that the mining properties should be included in the rate base. Nor is it clear, as appellant claims, that the necessary effect of classifying the mines as noncarrier properties would be to exclude them from consideration as capital in the issuance of securities. (App. Br., pp. 7, 48.) Even though under the Commission's view securities could probably not be issued for the purpose of acquiring coal mining properties, it would seem that under Section 20a (2) such interest as appellant has in the mines could be used as collateral for a security issued thereunder. The question, therefore, is whether the Commission's order is so entirely at variance with the fundamental principles of correct accounting as intrinsically to manifest an abuse of power. *Kansas City Southern Railway Company* v. *United States,* 231 U. S. 423, 444.

The standardization of the book entries of carriers subject to the Act was one of the principal objects sought to be realized by Section 20. *Kansas City Southern Railway Company* v. *United States*, 231 U. S. 423, 441. Unless the accounts of the carriers speak a common language the Commission is deterred in the performance of its regulative duties over the carriers as a whole. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 211, 212. There was evidence before the Commission that the inclusion of the value of mining properties generally under the heading of "Investment in Road and Equipment" would be destructive of uniformity, and that, with respect to this case, such a course would not permit precise comparison between appellant and other railroads of the country. (R. 147, 178, 232.) There was also evidence that the business of mining coal was seldom engaged in by carriers and that accounts suitable for the administration of railway service were not applicable to mining operations. (R. 147, 217.) Under these circumstances it would seem that the Commission's action was amply within its statutory powers, particularly in view of the provisions of the order permitting appellant to charge periodically to its operating expenses, the cost of coal produced and used in its operations. The effect of the order, moreover, was not to deprive appellant of an opportunity to earn a return on its investment in the collieries. Not only is the classification not binding

for rate purposes, but there is nothing in the portion of the order permitting a charge to operating expenses on the basis of the cost of coal consumed which precludes the charge of carrying costs on the investment.[2] The lower court, in its opinion, indicated that it did not regard the order as confining appellant to the mere cost of mining the coal, without allowance for depletion, depreciation, carrying charges, etc. (R. 313.) In its *ex parte* order of January 14, 1928, the Commission permitted such allowances (R. 14), and in its report of January 5, 1931, stated that it would reopen this proceeding whenever necessary in order to further consider and regulate the accounting under which the costs per ton were ascertained (R. 33). The principal witness for the Commission, although taking the view that the mining properties should be classified as noncarrier, recommended the inclusion of these various items in the carrier's operating expenses. (R. 219.)

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[2]Appellant contends (brief, p. 14) that the Commission's order required that the coal produced by appellant in its mines and used by it should be entered in its expense accounts at bare cost. As stated above, we do not believe the order has this effect. The order provides that the monthly charges for coal produced in the mines and consumed by appellant shall be "on the basis of the average monthly cost per ton for producing said coal," which would seem to include carrying costs and current charges for depletion and depreciation. (R. 34.) In any event, the amount of these charges was to be fixed by subsequent action of the Commission. (R. 34.)

Without reference to the technical considerations which relate to the question whether these mines are used for carrier purposes, the Commission's order is fair to appellant and is reasonably related to the purposes designed to be effected by Section 20. The classification indirectly challenged has been in effect since 1914 and is rested upon the customs and practices of the carriers, whose representatives participated in its formulation. (R. 138.) Appellant itself conformed to the general practice, apparently without objection, until 1927. (R. 18; Def. Ex. 1, R. 296.)

II

APPELLANT'S COAL MINING PROPERTY AND LEASEHOLDS ARE NOT DEVOTED TO TRANSPORTATION SERVICE

The Commission's action in requiring the classification of the mining properties as nontransportation properties was also reasonable when considered in the light of the essential character of mining operations. The business of coal mining is entirely separate and distinct from that of transportation, the one involving extraction, the other carriage for hire. The distinction between the two is not destroyed by the fact that the output of the mine is used to supply appellant's fuel requirements. It is but the product that is used in carrier operations, appellant's investment being devoted to an undertaking separate from that of carriage. There are numerous activities in which a carrier may engage

which are not common carrier functions, even though they may result in the supply of needed facilities. The production of steel for rails, the making of ties, the manufacture of cars all provide facilities for carrier use, yet it would hardly be contended that these are common carrier activities or that property employed therein is devoted to transportation service. It has been held that a railroad company is not acting as a common carrier in constructing, improving or repairing its road or in building needed extensions and branches. *Santa Fe, Prescott & Phoenix Railway Company* v. *Grant Brothers Construction Company*, 228 U. S. 177, 186. In that case it was also held that the transportation of supplies and of employees of the contractor was not a common carrier engagement.

The subsequent consumption of coal extracted from these mines by appellant's trains and locomotives is a connection too remote to require the classification of the mines as carrier properties. In *State* v. *Commissioners of Mansfield*, 23 N. J. L. 510, there was involved the question whether dwelling houses owned by a railroad were exempt from taxation under a clause in its charter. The court held that these properties were not necessary appendages of a railroad company and were not within the exempted class. The court said (p. 514):

> The necessary appendages of a railroad and transportation company are one thing, and those appendages which may be convenient

means of increasing the advantages and profits of the company are another thing. It might be advantageous for the company to purchase land, and to erect houses in the right location and of the right kind for all their constant employees, to establish factories for making their own rails, engines, and cars, even to purchase coal mines and supply themselves with fuel; but these are not among the *necessary* powers of such a company.

In *Eldridge* v. *Smith,* 34 Vt. 484, the question was presented whether a factory for manufacturing railroad cars was a part of the appurtenances of the road so as to be included in a mortgage on the carrier properties. The court there held that the business of manufacturing cars and engines was a distinct branch of mechanical industry, carried on wholly independent of any connection with railroads, and could not be considered as a part of the transportation property.

The business of coal mining is one in which a carrier need not of necessity engage, ample supplies being obtainable from private sources. The public interest is not served by the classification of such facilities as transportation properties with the consequent encouragement of investments therein by carriers. Facilities such as water stations, pump houses, etc., are necessary to carrier operations and do not encourage private investment, and have accordingly been classified as transportation properties. The classification of car

manufacturing plants, lumber mills, steel mills, and oil and mining properties as noncarrier properties is, *per contra,* justified.

Property employed in transportation is dedicated to the public use and the public may regulate the rate to be exacted in the operation of such property. Rate making and the recapture of excess net railway operating income are therefore based upon the value of this property. Property employed in the subsidiary business of mining coal is not dedicated to the use of the public and the public has no right to regulate the rate to be exacted in the operation of such property. Upon the question whether appellant's coal mining property was dedicated to the use of the public, the court below said (R. 312):

> Coal mines, even though owned and operated by a carrier, are clearly not dedicated to the use of the public. See *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522. Although the coal produced by operation of the mines may be said to be used by the public, the mines themselves are not so used. What is used, and all that is used, in the public business of transportation is the coal which prior to its use has been made available by the independent business of mining. The mines of a carrier, therefore, are not dedicated to a public use any more than are mines owned by a private corporation which supplies coal to a carrier under contract. They stand upon the same

> basis with respect to the public service as do plants for manufacturing cars or locomotives. A railroad may not abandon service on its railroad lines and may not lease or sell them without the consent of the Commission because of the rights of the public therein; but no one would contend that the carrier here might not at its pleasure discontinue the operation of its coal mines or lease or sell them as it might see fit.

It is important that the accounts kept by carriers should separately show the financial operations of the carriers with respect to matters within the scope of the Commission's regulatory powers. Section 20 of the Act was upheld against the claim of invalidity upon the ground that its requirement of complete disclosure in a manner prescribed by the Commission was necessary to the exercise of the Commission's regulatory powers. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 211.

The business of mining coal is not commerce even though the coal when mined is to be used or transported in commerce. *Delaware, L. & W. R. R. Co.* v. *Yurkonis*, 238 U. S. 439; *United Mine Workers of America* v. *Coronado Coal Company*, 259 U. S. 344, 407; *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, 178. It follows that coal mining also is not transportation.

That the ownership of coal mines by a carrier is distinct and separate from the transportation serv-

ice which it performs is apparent from the fact that the law does not permit such ownership to interfere with the carrier's obligation to furnish equal transportation service to all alike. (*Delaware, L. & W. R. R. Co.* v. *United States*, 231 U. S. 363, 370; *Assigned Car Cases*, 274 U. S. 564.)

Appellant urged before the lower court that if the property is not regarded as used in the transportation service the mines should be treated as a supply of consumable coal and thus classified as property used in transportation. It is submitted that the Commission has adopted a reasonable method of dealing with the subject upon this theory, since it has permitted appellant to charge to operating expenses the cost of coal as mined, presumably including depletion, carrying charges, etc. In effect the claim for carrier classification on this ground rests upon the hypothesis that it is reasonable to have on hand consumable materials calculated to last for thirty-five years. There was evidence that the normal and reasonable coal requirements for a carrier would not be in excess of a few weeks' supply and that appellant has held only a relatively small supply in storage. (R. 23, 130.) The Commission's practice in valuation cases with respect to material and supply items was to exclude them if unused unless the carrier had reduced them to usable form and transferred them to the material and supplies account. (R. 23.) Manifestly coal yet to be mined can not be regarded as a usable supply, but only as a reserve supply.

Appellant would not under the applicable valuation principles be entitled to have included in its rate base a fuel supply sufficient to last for thirty-five years. Only the value of that property which is used in the performance of the public service can be taken as the basis for fixing rates. *Houston* v. *Southwestern Bell Telephone Company*, 259 U. S. 318, 324; *Bluefield Water Works & Improvement Co.* v. *Public Service Commission*, 262 U. S. 679, 690; *Minnesota Rate Cases*, 230 U. S. 352, 434. It could hardly be contended by appellant that there is an imminent need for a thirty-five years' supply of fuel, and it would therefore be proper to exclude it from consideration as a basis for fixing rates, even if that were the nature of this proceeding. *Spring Valley Waterworks* v. *City, etc., of San Francisco*, 192 Fed. 137, 156 (C. C., N. D. Cal.); *Consolidated Gas Co.* v. *City of New York*, 157 Fed. 849 (C. C., S. D. N. Y.). Since appellant recommended that the entire investment should fall into one classification, it is not necessary to speculate as to the quantity of coal, use for which might be regarded as imminent. (R. 176.)

Appellant seems to have abandoned the claim made in the court below for carrier classification which rested upon the assertion that its investment in the coal mines had proved advantageous, savings of $2,631,445 having been estimated (Ex. 5; R. 48A.) It was shown that in arriving at this estimate no consideration was given to the carrying charges on the investment, which, if taken at 6%,

indicate a savings of but $861,712 over the price of purchased coal. (Ex. 74, R. 240A.) Obviously a part of the price paid by appellant for outside coal is due to such indirect costs. While the matter of economic advantage or disadvantage of owning mines does not bear upon their essential character, subsequent events have shown the inadvisability of carriers' engaging in such outside ventures. Appellant asserts (brief, pp. 39–41) that good management justified investment in these mines at the time of their purchase. Savings were undoubtedly realized during the early years of the operation of these mines when prices were rising and there was a shortage of coal cars. From 1925 to 1928 no saving over the cost of purchased coal was shown. (Ex. 74, R. 240A.) One of appellant's witnesses testified that at the time of the hearing coal could be purchased under spot contracts for less than the cost of mining and that the collieries could probably then be purchased for less than the prices paid for them. (R. 131.) If interest at 6% on appellant's investment in its coal mines is included in the cost of mining coal, in 1925, 1926, 1927, and the first nine months of 1928, its own coal cost it more than its purchased coal. (Ex. 74, R. 240A.) Appellant does not intend to increase the productivity of its mines. (R. 123.) These conditions have undoubtedly been accentuated by the subsequent fall in commodity prices, of which the Court may take judicial notice.

The facts of this case illustrate the advisability of a policy which requires carriers to make ventures into the facility and supply field at their own risk. This will not be so if such investments are classified as employed in the public service. The Commission's order protects the public interest by making the carrier assume the risk of the investment. The order also prevents appellant from saddling upon present shippers the cost of carrying the unused portions of its mines. (Ex. 54, R. 151; R. 167–168.)

Appellant contends (brief, pp. 42–47) that for the Commission to classify these investments as noncarrier would be to substitute its judgment for that of appellant in a matter of internal management. *Pacific Telephone and Telegraph Co.* v. *Whitcomb,* 12 F. (2d) 279, 288, affirmed, 276 U. S. 97, and *Denver Union Stock Yard Co.* v. *United States,* 57 F. (2d) 735, are cited as holding that regulation does not permit interference with the power of management. In the former case the telephone company had invested in apparatus beyond its then existing needs and in the latter case the stockyards company had acquired adjacent real estate for future needs. In each case the investment was in property of the kind required for the performance of the service rendered by the company. But coal mines are not necessary for furnishing transportation by railroad, as demonstrated by the fact that but few railroads own coal mines (*supra,* p. 13).

The Commission's determination that these mines are not property devoted to transportation service is a determination of fact by a tribunal "informed by experience" and is entitled to great weight. *Virginian Railway Co.* v. *United States,* 272 U. S. 658, 665–666.

There is now pending before the Commission appellant's protest and objections to a recapture report and order of the Commission in which the question here presented is involved. (R. 308.)

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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OCTOBER, 1932.

APPENDIX

Section 15a of the Interstate Commerce Act provides in part as follows:

> (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.
>
> (4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. * * * Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value. (C. 91,

41 Stat. 488, U. S. C., Title 49, sec. 15a (2), (4).)

Section 19a of the Interstate Commerce Act provides in part as follows:

> (a) That the commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. * * *
>
> (b) First. In such investigation said commission shall ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value and each of the foregoing cost values.
>
> * * * * *
>
> (e) * * * all rules and regulations made by the commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. * * * (C. 92, 37 Stat. 701; c. 91, 41 Stat. 493; c. 210, 42 Stat. 624; U. S. C., Title 49, sec. 19a (a), (b), (e).)

Section 20 of the Interstate Commerce Act provides in part as follows:

> (5) The Commission may, in its discretion, prescribe the forms of any and all

accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. * * * The Commission shall at all times have access to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by carriers subject to this Act, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the commission, * * *.

(6) In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act. (C. 3591, 34 Stat. 594; c. 91, 41 Stat. 493, 494; U. S. C., Title 49, sec. 20 (5), (6).)

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SUPREME COURT OF THE UNITED STATES.

No. 18.—October Term, 1932.

Norfolk & Western Railway Company, Appellant, *vs.* The United States of America and Interstate Commerce Commission.	Appeal from the District Court of the United States for the Western District of Virginia.

[November 7, 1932.]

Mr. Justice Roberts delivered the opinion of the Court.

The Interstate Commerce Commission issued an order pursuant to Section 20[1] of the Interstate Commerce Act, as amended, requiring the Norfolk & Western Railway Company to carry certain coal mining properties in its accounts as not used in the service of transportation. The railway filed a petition in the District Court to enjoin the enforcement of the order, and from a decree of dismissal by a District Court, of three judges, this appeal was taken.

During the period between 1917 and 1920 the railway experienced difficulty in obtaining an adequate supply of coal of satisfactory quality for use in its locomotives. In an effort to meet this situation and to reduce costs of operation three coal mines, adjacent to the right of way, were acquired, the terms of purchase being that they should be used solely for the supply of locomotive fuel. The investment was, as of September 30, 1928, after debits for depreciation and depletion, $2,650,467.28. The estimate is that the coal in the three mines will be exhausted in seventeen years, thirty-three years, and thirty-five years respectively. The entire output, except for a trifling amount furnished to mine employees, is consumed in carrier activities. The collieries furnish approximately forty-eight per cent. of the railway's requirements.

A general order of the Commission, in force long prior to the company's purchase of the mines, required such assets to be shown

[1] U. S. C., Tit. 49, § 20.

under Account 705, "Miscellaneous Physical Property", which included investments in physical property not used in transportation. Since acquisition of the first of the mines the railway has carried the investment in this account. In 1927 the company addressed a letter to the Commission requesting permission to transfer the investment from Account 705 to Account 701, which comprises investment in road and equipment. Thereupon an *ex parte* order was made directing that, as theretofore, the cost of the collieries should appear in Account 705. On petition a hearing was afforded, after which the Commission entered the order now under attack, prescribing that the investment be carried under Account 705, and providing further that the charges to Account 716, "Material and Supplies", for coal ~~purchased~~ produced for consumption in appellant's transportation operations, be upon the basis of the average monthly cost per ton of producing coal; adding that if necessity should appear the proceeding would be reopened for the purpose of considering and further regulating the accounting under which the costs per ton are ascertained.

First. The Commission's order is challenged as in excess of the statutory grant of power. The concession is made that Section 20 of the Act grants a discretion to prescribe a uniform system of accounts, the manner in which they shall be kept, and the forms thereof. The appellant, however, asserts that this discretion is limited by the purposes and ends for which such accounts are to be kept, as exhibited in other sections of the Act. Reference is made to the valuation section (19a),[2] which calls upon the Commission to report "the value of all the property owned or used by every common carrier", and specifies in subparagraph (b) that as part of the investigation the Commission shall "ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier . . .". Stress is laid upon the fact that final valuations made by the Commission are to be *prima facie* evidence of the value of the property in all administrative and judicial proceedings under the Act. So also the appellant seeks support for this contention in the fair return and recapture section (15a),[3] which assures to the carrier "a fair return upon

[2]U. S. C., Tit. 49, § 19a.

[3]U. S. C., Tit. 49, § 15a.

the aggregate value of the railway property of such carriers held for and used in the service of transportation", and for recapture of income in excess of a return of six per centum upon the value of such railway property. The phrases employed in these sections,—"in the service of transportation", and "for purposes of a common carrier",—are said to mark the limits of the statutory power of the Commission in classifying capital assets for accounting purposes.

In view of the uncontradicted fact that the mines in question were purchased for and dedicated to the use of fuel supply and may not be used for any other purpose, the appellant deems it necessarily to follow that these assets were acquired for carrier purposes and are used in the service of transportation, and serve no other purpose or use whatsoever. The conclusion sought to be drawn is that although the Commission may exercise a reasonable discretion in prescribing the nature and form of accounts, it has in the present instance plainly exceeded that discretion and by classifying as non-transportation property that which was acquired to serve transportation activities and promote the purposes of carriage of persons and goods, has transgressed statutory boundaries.

We must examine the origin, the purpose, the reenactment of the statutory provision, and the practice of the Commission thereunder, to resolve the question thus presented. The authority to require annual reports from carriers and to prescribe a uniform system of accounts was conferred on the Commission by the Interstate Commerce Act of 1887,[4] and was but slightly elaborated in statement by the Hepburn Act and the Transportation Act, 1920.[5] One of the prime purposes of Section 20 is and has been since the adoption of the Act of 1887, that the carriers' accounts should be uniform, so as to afford the Commission and the public a basis for comparison of their respective operations. In orders issued pursuant to this legislation the Commission, as early as 1914, drew a distinction, for purposes of accounting, between transportation and non-transportation property. The rule as to classification which appellant attacks had been in force long prior to the pass-

[4]Act of February 4, 1887, c. 104, § 20, 24 Stat. 386.

[5]Act June 29, 1906, c. 3591, § 7, 34 Stat. 593; Act February 28, 1920, c. 91, §§ 434-438, 41 Stat. 493, 494.

age of the Transportation Act, which added to the law theretofore in effect Section 15a, respecting recapture, and prior to the enactment of the Act of March 1, 1913,[6] which added Section 19a, concerning valuation, to which appellant turns for the limitations it would have us read into section 20. Moreover, those sections draw the very distinction which the Commission order has long enforced. Section 15a, in referring to the fair return guaranteed the carrier, speaks not of the property as a whole, but of "the *railway property* held and used for the service of transportation". And Section 19a commands the Commission to show separately in any report "the property held for purposes other than those of a common carrier".

Plainly, the Commission, under the authority conferred upon it by Congress, must draw a line between the two sorts of property owned by the railroads. Within broad limits that body's determination is necessarily beyond revision and correction by the courts. The record shows that it is unusual for a railroad to own mines for the production of locomotive fuel; in fact we are referred to no other similar instance. Whether the Commission should make special classifications to fit exceptional cases lies within the discretion conferred, and courts ought not to be called upon to interfere with or correct alleged errors with respect to accounting practice. If we were in disagreement with the Commission as to the wisdom and propriety of the order, we are without power to usurp its discretion and substitute our own. *Kansas City So. Ry.* v. *United States*, 231 U. S. 423, 444, 456.

Second. With great earnestness the appellant characterizes the order as in several aspects a denial of due process. It declares that by virtue of the Commission's mandate an unfair and improper rate base is fixed, and a capital asset properly to be taken into account for purposes of recapture is eliminated. But this is to ignore the fact that the order is one touching accounting merely; that before any rate base can be ascertained or any basis of recapture determined the carrier will be entitled to a full hearing as to what property shall be included; and not until the Commission excludes the assets in question from the calculation may the carrier assert the infliction of injury to its rights of property. A recapture proceeding is now pending against the appellant,

[6]C. 92, 37 Stat. 701.

wherein full opportunity will be afforded to present any claims with regard to the inclusion in whole or in part of the mining properties in question.

We are not convinced by the assertion that the necessary effect of classifying the mines as non-carrier properties is to exclude them from consideration as capital in the issuance of securities. We are not, however, required now to decide this question, for the mere accounting classification can conclude neither the Commission nor the appellant upon the hearing of an application under Section 20a (2).[7]

Denial of due process is also predicated upon the assertion that the Commission's order is wholly unsupported by the evidence. Appellant invokes the principle that due process requires not only a hearing, but a fair consideration of the evidence, and says that no effect was given to the uncontradicted testimony. The report demonstrates that the Commission did give painstaking attention to the question of the proper classification of the asset in question by comparison of mines for fuel supply with water rights, gas and power plants, locomotive and car manufacturing plants, timber lands purchased for future supply of ties, and other kinds of property which have been heretofore classified as falling partly or wholly within or without the category of transportation property. The record demonstrates that an adequate hearing was afforded and due weight given to the evidence.

Appellant also characterizes the Commission's action as a denial of the legal right of the railway to adopt fair and reasonable methods of accounting. We have shown that the order made does not affect the right to a fair return, or to determination of the full and fair value of the carrier's entire property and assets, and does not amount to a taking thereof. The objection now under consideration asserts merely that the company is lawfully entitled to maintain a reasonable system of accounting. But there is no right to a particular form of accounting as such. Doubtless a Commission order under Section 20 might be so arbitrary and outrageous as to call for correction. The present is not such a case. What has been done clearly does not amount to an abuse of power. See *Kansas City So. Ry.* v. *United States, supra.*

The order is assailed further as an undue and unwarranted interference with managerial discretion. Much is said of the

[7]U. S. C., Tit. 49, § 20a (2).

wisdom and far-sightedness of obtaining an adequate supply of a commodity necessary to the continuance of the railway's transportation system. The danger of limiting or hampering railway executives in the exercise of sound discretion and good policy is stressed. But nothing in the order prevents the exercise of such policy. The basis of the Commission's order is merely that if a carrier determines to go into the business of manufacturing articles for use in connection with its activities as a carrier, such as are ordinarily purchased by railroads from independent manufacturers or producers, these shall not appear in the accounts as investments in railway property used in the service of transportation. No benefit derived from such activities is denied the carrier, nor does the required classification in any way take the property of the company or impair its value.

Third. Finally, complaint is made of that portion of the Commission's order which requires the charges to Account 716, "Material and Supplies", for coal produced from the collieries for consumption in the appellant's transportation operations, to be upon the basis of the average monthly cost for producing the coal. The objection seems to be grounded on the premise that actual cost of production is not the proper item to go into that account. The Commission, however, expressed a willingness to reopen the case and to give further consideration, if necessary, to the method of charging coal from these mines as a cost of transportation. The record therefore fails to show that in this aspect the appellant has suffered harm from the order.

The judgment of the District Court is

Affirmed.

Mr. Justice BUTLER took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.